(1)

90-1327
CASE NO. _____

Supreme Court, U.S.
FILED
JAN 15 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1990 TERM

PALM COURT, INC., a Florida corporation, CARL A. SAX and LANNY A. HORWITZ,

Petitioners,

vs.

THE DISTRICT COURT OF APPEAL FOR THE FOURTH DISTRICT, STATE OF FLORIDA, and VAUGHN DURHAM, et al.,

Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Counsel for Petitioners

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1990 TERM

PALM COURT, INC., a Florida corporation, CARL A. SAX and LANNY A. HORWITZ,

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QUESTION PRESENTED FOR REVIEW

MAY A STATE COURT DENY THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY AND DUE PROCESS BY APPELLATE REVIEW BY ENFORCING A FINAL JUDGMENT BY PERMITTING THE GARNISHMENT OF THE COURT REPORTER TO BLOCK COMPLETION OF THE RECORD ON APPEAL? -- DID THE SUPREME COURT OF THE STATE OF FLORIDA DEPRIVE PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO JURY TRIAL AND TO DUE PROCESS BY APPELLATE REVIEW BY DENYING THE PETITION FOR WRIT OF MANDAMUS TO COMPEL THE FOURTH DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA TO PERFORM ITS MINISTERIAL DUTY TO REVIEW PETITIONERS' APPEAL OF THE DECISION OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA, WHERE THE APPLICATION OF FLA.R.CIV.P. 1.570(a) REGARDING ENFORCEMENT OF FINAL JUDGMENTS APPARENTLY CAUSED

PETITIONERS' APPEAL TO BE DISMISSED SINCE THE FOURTH DISTRICT COURT OF APPEALS APPARENTLY DISMISSED PETITIONERS' APPEAL AS A SANCTION FOR PETITIONERS' ALLEGED FAILURE TO PROVIDE A COMPLETE TRIAL TRANSCRIPT ALTHOUGH PETITIONERS' ALLEGED FAILURE WAS ATTRIBUTABLE TO THE TRIAL COURT'S ENFORCEMENT OF THE FINAL JUDGMENT ENTERED AGAINST PETITIONERS BY PERMITTING RESPONDENTS, VAUGHN DURHAM, et al, TO GARNISH THE COURT REPORTER AND TO BLOCK PREPARATION OF THE RECORD ON APPEAL?

LIST OF ALL PARTIES

Petitioners:

(a) Palm Court, Inc.
7000 Central Parkway
Suite 1460
Atlanta, GA 30328

(Palm Court, Inc. has neither parent companies nor subisdiary companies)

(b) Carl A. Sax
6015 N. Ocean Boulevard
Ocean Ridge, FL 33435

(c) Lanny A. Horwitz
7000 Central Parkway
Suite 1460
Atlanta, GA 30328

Respondents:

(a) Fourth District Court of Appeal,
State of Florida
P.O. Box A
West Palm Beach, FL 33402

(b) Vaughn Durham, et al.
c/o Michael A. Hanzman, Esq.
Zack, Hanzman & Ponce, P.A.
One Centrust Financial Centre
100 S.E. Second Street
Suite 3300
Miami, FL 33131

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TABLE OF AUTHORITIES

U.S. Constitution, Amendment VII

U.S. Constitution, Amendment XIV

Declaration of Rights,
Art. I, § 9, Fla.Const.

Declaration of Rights,
Art. I, § 22, Fla.Const.

Fla.R.Civ.P. 1.430 (a)

Fla.R.Civ.P. 1.570 (a)

LIST OF ORDERS

1. October 17, 1990 Order of the Supreme Court of Florida in Case No. 76,653, denying Petition for Writ of Mandamus, without opinion.

2. September 5, 1990 Order of the Fourth District Court of Appeal of the State of Florida in Case No. 88-1203, denying Motion for Rehearing and Motion for Rehearing En Banc, without opinion.

3. June 4, 1990 Order of the District Court of Appeal of the State of Florida in Case No. 88-1203, dismissing the Appeal from the decision of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida in Case No. 86-3885, without opinion.

GROUNDS FOR JURISDICTION

Pursuant to 28 USC § 1257, Palm Court, Inc., a Florida corporation, Carl A. Sax and Lanny A. Horwitz (collectively, "Petitioners"), respectfully petition this Court for a Writ of Certiorari compelling the Supreme Court of the State of Florida (the "State Supreme Court") in Case No. 76,653, to reverse its October 17, 1990 Order denying the Petition for Writ of Mandamus, and to remand to the District Court of Appeal for the Fourth District, State of Florida (the "Fourth District") Case No. 88-1203, to perform the Fourth District's ministerial duty to review, on its merits, Petitioner's appeal (the "Appeal"), of the decision of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Trial Court") in Case

No. 86-3885.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment VII -

> "In Suits at common law, where the value in controversey shall exceed twenty dollars, the right of trial by jury shall be preserved...."

U.S. Constitution, Amendment XIV -

> "....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Declaration of Rights, Art. I, § 9, Fla.Const. -

> "No person shall be deprived of life, liberty, or property without due process of law...."

Declaration of Rights, Art. I, § 22, Fla.Const. -

> "The right of trial by jury shall be secure to all and remain inviolate."

Fla.R.Civ.P. 1.430 (a) -

> "The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate."

Fla.R.Civ.P. 1.570 (a) -

> "Final process to enforce a judgment solely for the payment of money shall be by execution, writ of garnishment, or other appropriate process or proceedings."

STATEMENT OF THE CASE

On March 28, 1988, the Trial Court, sitting without a jury, entered a final monetary judgment and memorandum opinion which found that Petitioners violated (a) § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2), (b) Chapter 517, § 301(1)(a)3 Fla.Stat. and (c) Chapter 517, § 301(1)(a)2 Fla.Stat.

On April 15, 1990, Petitioners filed their Initial Brief and Appendix to Initial Brief to review the issues raised on appeal which were not evidentiary, including whether the Trial Court erred in denying Petitioners the constitutional right to jury trial. (See Composite Exhibit A, Pages 85 - 98, 121 - 125, Appendix, Exhibit 4)

On June 4, 1990, the Fourth District, without opinion, dismissed the Appeal apparently based upon the assertion that "this appeal (should) be dismissed as a sanction for the appellants' repeated failures to provide a transcript of the trial." (Appendix, Exhibit 1)

On September 5, 1990, the Fourth District, again without opinion, denied Petitioners' Motion for Rehearing and Motion for Rehearing En Banc. (Appendix, Exhibit 2)

On September 20, 1990, Petitioners filed a Petition for Writ of Mandamus and Appendix petitioning the State Supreme Court to compel the Fourth District to review, on its merits, Petitioners' Appeal. (Appendix, Exhibit 4, Pages 23 - 31)

On October 17, 1990, the State Supreme Court, without opinion, rendered a final state court judgment, by denying the Petition for Writ of Mandamus. (Appendix, Exhibit 3)

As a result of the State Supreme Court's denial of the Writ of Mandamus, and the Fourth District's dismissal of the Appeal and denial of Petitioners' Motion for Rehearing and Motion for Rehearing En Banc, Petitioners have been denied the constitutional right to trial by jury and to due process by appellate review since Petitioners were financially unable to post a supersedeas bond to avoid the enforcement of a final judgment by garnishing the court reporter to block the preparation of the record of appeal, and, in turn, the Appeal itself.

ARGUMENT

This Court has jurisdiction to issue a Writ of Certiorari under 28 USC § 1257, since (a) the October 17, 1990 Order denying the Petition for Writ of Mandamus was a final state court judgment, (b) the state court judgment hinges upon a substantial federal question, and (c) the state court rendering the judgment has so far departed from the accepted course of judicial proceedings as to call for the exercise of this Court's supervisory power.

The State Supreme Court had jurisdiction to issue a Writ of Mandamus under Art. V § 3(b)(8) Fla.Const. (1980) and Fla.R.App.P. 9.030(a)(3), since the jurisdiction of the Fourth District was properly invoked, and the Fourth Dis-

trict, in discharging it's ministerial duty to resolve the Appeal on its merits, should not have decided the Appeal, without opinion, on apparently procedural grounds, namely Petitioners' alleged failure to complete the record on appeal, since:

> "....the Constitution provides that 'The Supreme Court shall have appellate jurisdiction of all cases at law and in equity originating in circuit courts'....but ... appellate procedure cannot be legally used to impair the right to invoke the appellate jurisdiction conferred upon the Supreme Court by the Constitution or to obstruct the powers of the court to make its appellate jurisdiction effective." Willey v. W.J. Hodgson Corporation, 89 Fla. 446, 105 So.126 (1925) See also, Sky Lake Gardens Recreation, Inc.

v. District Court of Appeal, Third District, 511 So. 2d 293 (Fla. 1987);

The nature of the relief sought by this Petition is a Writ of Certiorari compelling the State Supreme Court to remand, for review on its merits, to the Fourth District, Petitioner's Appeal.

The State Supreme Court's denial of the Petition for Writ of Mandamus, without opinion, prior to receipt of Respondent's Reply, and the Fourth District's (a) dismissal of the Appeal almost two months after the filing of the Initial Brief, without opinion, and (b) denial of the Motion for Rehearing and Motion for Rehearing En Banc, also without opinion, are attempts by the State Supreme Court and the Fourth District to avoid their ministerial duty to decide the Appeal on

its merits, thereby denying Petitioners both the right to trial by jury and due process by appellate review.[1]

Under the U.S. Constitution, Amendments VII and XIV, "In Suits at common law...the right of trial by jury shall be preserved...." and "No State shall...deprive any person of...property, without due process of law...."

Under Declaration of Rights, Art. 1, §§ 22 and 10, Fla.Const., "The right of trial by jury shall be secure to all and

---

1. In the Petition for Writ of Mandamus, Petitioners contended that (a) the applicable portion of the record on appeal had been prepared and (b) the appropriate statutory procedure for the Fourth District to have followed in the discharge of its ministerial duties would have been to review the Initial Brief and request Respondents Vaughn Durham, et al, not Petitioners, to supplement the record consistent with Fla.R.App.P. 9.200(b)1. (See Appendix, Exhibit 4, Pages 29 - 32)

trial by jury shall be secure to all and remain inviolate." and "No person shall be deprived of life, liberty, or property without due process of law...." (See also Fla.R.Civ.P. 1.430(a))

If the State Supreme Court is not compelled to remand Petitioners' Appeal to the Fourth District and the dismissal of the Appeal by the Fourth District was premised on procedural grounds, namely Petitioners' failure to complete the trial record, then the Trial Court's order permitting Respondents' Vaughn Durham et al to garnish the court reporter deprived Petitioners of due process by appellate review and the right to trial by jury because Petitioners were unable to post a supercedeas bond to stay final enforcement of the Trial Court's judgment under Fla.R.Civ.P. 1.570(a).

This Court should compel the State Supreme Court to remand this case to the Fourth District to determine Petitioners' Appeal on its merits, or a state court would otherwise be permitted to deny a citizen of these United States the constitutional right to trial by jury and due process by appellate review by permitting the garnishment of a court reporter to serve as an excuse to dismiss an appeal for failure to complete the record on appeal.

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Counsel of Record

Carl A. Sax, Esq.
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Counsel for Petitioners

CERTIFICATE OF SERVICE

As counsel of record, I hereby certify that three copies each of the foregoing Petition for Writ of Certiorari and Appendix has been furnished to the District Court of Appeal for the Fourth District of the State of Florida, P.O. Box A, West Palm Beach, FL 33402 and to Michael A. Hanzman, Esq., Zack, Hanzman & Ponce, P.A. attorneys for Respondents, Vaughn Durham et al, One Centrust Financial Centre, Suite 3300, 100 S.E. Second Street, Miami, FL 33131 this 14th day of February, 1991.

Lanny A. Horwitz, Esq.

BEST AVAILABLE COPY

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1990 TERM

PALM COURT, INC., a Florida corporation, CARL A. SAX and LANNY A. HORWITZ,

Petitioners,

vs.

THE DISTRICT COURT OF APPEAL FOR THE FOURTH DISTRICT, STATE OF FLORIDA, and VAUGHN DURHAM, et al.,

Respondents.
_____/

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Counsel for Petitioners

APPENDIX, EXHIBIT 1

JUNE 4, 1990 FOURTH DISTRICT
DISMISSAL OF THE APPEAL

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

PALM COURT, INC., et al.,

Appellant(s),

v. CASE NO. 88-1203

VAUGHN DURHAM, et al.,

Appellee(s).

June 4, 1990

BY ORDER OF THE COURT:

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

ORDERED that the Appellees' March 16, 1990 renewed motion to dismiss appeal is granted and the above-styled appeal is dismissed.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK.

cc: Sally R. Doerner
Lanny A. Horwitz
Hon. John B. Dunkle, Clerk (86-3885 CLF & 86-9123 CEF)

cms

APPENDIX, EXHIBIT 2

SEPTEMBER 5, 1990 FOURTH DISTRICT
DENIAL OF MOTION FOR REHEARING
AND MOTION FOR REHEARING EN BANC

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

PALM COURT, INC., et al.,

Appellant(s),

v. CASE NO. 88-1203

VAUGHN DURHAM, et al.,

Appellee(s).

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

September 5, 1990

BY ORDER OF THE COURT:

ORDERED that the Appellants' June 15, 1990 motion for rehearing and motion for rehearing en banc are denied.

ORDERED that Appellants' July 16, 1990 motion to sever consolidated appeal is denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK.
cc: Larry A. Horwitz
Carl A. Sax
Michael A. Hanzman
cms

APPENDIX, EXHIBIT 3

STATE SUPREME COURT DENIAL
OF PETITION FOR WRIT OF MANDAMUS

SUPREME COURT OF FLORIDA

WEDNESDAY, OCTOBER 17, 1990

PALM COURT, INC., etc.,

Petitioners,

v. CASE NO. 76,653

DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, et al.,

Respondents.

The petitioner in the above cause has filed a Petition for Writ of Mandamus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

OVERTON, Acting C.J., MCDONALD, EHRLICH, BARKETT AND KOGAN, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk, Supreme

H
cc: Lanny A. Horwitz,
Esquire
Carl A. Sax,
Esquire
Hon. Clyde L. Heath,
Clerk
Michael A. Hanzman,
Esquire
Hon. George W. Hersey
C.J.

APPENDIX, EXHIBIT 4

PETITION FOR WRIT OF MANDAMUS
AND APPENDIX

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PALM COURT, INC., a
Florida corporation,
CARL A. SAX and
LANNY A. HORWITZ,

Petitioners,

vs.

THE DISTRICT COURT
OF APPEAL FOR THE
FOURTH DISTRICT,
STATE OF FLORIDA,

Respondent.

and

VAUGHN DURHAM, et al.,

Respondents.

CASE NO._____
FOURTH DISTRICT
COURT OF APPEAL
CASE NO. 88-1203

PETITION FOR WRIT OF MANDAMUS

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Attorneys for Petitioners,
Palm Court, Inc., Carl A. Sax
and Lanny A. Horwitz

PETITION FOR WRIT OF MANDAMUS

Pursuant to Fla.R.App.P. 9.100, Palm Court, Inc., a Florida corporation, Carl A. Sax and Lanny A. Horwitz (collectively, "Petitioners"), respectfully petition this Court for a Writ of Mandamus compelling the District Court of Appeal for the Fourth District, State of Florida (the "Fourth District") to review, on its merits, Petitioner's appeal (the "Appeal"), in Case No. 88-1203, of the decision of the Circuit Court for the Fifteenth Judicial Circuit of the State of Florida (the "Trial Court") in Case No 86-3885.

I
BASIS FOR INVOKING JURISDICTION

This Court has jurisdiction to issue

a Writ of Mandamus under Art. V § 3(b)(8) Fla.Const. (1980) and Fla.R.App.P. 9.030(a)(3). Mandamus is the proper remedy since the jurisdiction of the Fourth District was properly invoked, and the Fourth District, in discharging it's ministerial duty to resolve the Appeal on its merits, should not have decided the Appeal on, apparently, procedural grounds, without opinion, since:

> "....the Constitution provides that 'The Supreme Court shall have appellate jurisdiction of all cases at law and in equity originating in circuit courts .... but ... appellate procedure cannot be legally used to impair the right to invoke the appellate jurisdiction conferred upon the Supreme Court by the Constitution or to

> obstruct the powers of the court to mak its appellate jurisdiction effective." Willey v. W.J. Hodgson Corporation, 89 Fla. 446, 105 So.126 (1925) See also, Sky Lake Gardens Recreation, Inc. v. District Court of Appeal, Third District, 511 So. 2d 293 (Fla. 1987);

and, the question of whether Petitioners have been denied their constitutional right to appeal the issue of their right to trial by jury, where preparation of the trial record was blocked by the Trial Court's Garnishment Order, is an issue of law relating to the constitutionality of garnishment when utilized to avoid the Supreme Court's appellate jurisdiction. Hess By and Through Hess v. Metropolitan Dade County, 467 So.2d 297 (Fla. 1985); Fine v. Firestone, 448 So. 2d 984 (Fla. 1984).

II
FACTS UPON WHICH THE PETITIONERS RELY

On March 28, 1988, the Trial Court, with the Honorable Daniel T.K. Hurley presiding, sitting without a jury, entered a final monetary judgment and memorandum opinion (the "Memorandum Opinion"), which found that Petitioners violated (a) § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2), (b) Chapter 517, § 301(1)(a)3 Fla.Stat. and (c) Chapter 517, § 301(1)(a)2 Fla.Stat.

On April 15, 1990, Petitioners filed their Initial Brief and Appendix to Initial Brief (Composite Exhibit A), to review the issues raised on appeal which are not evidentiary, namely whether the Trial Court erred in denying Petitioners (a) a jury trial as guaranteed by the Florida Constitution and (b) judicial

enforcement of a contract.

On June 4, 1990, the Fourth District, without opinion, dismissed the Appeal (Exhibit B), apparently based upon the assertion that "this appeal (should) be dismissed as a sanction for the appellants' repeated failures to provide a transcript of the trial." See March 15, 1990 Renewed Motion to Dismiss Appeal (Exhibit C), March 24, 1990 Response to Renewed Motion to Dismiss Appeal (Exhibit D), April 12, 1990 Motion to Enforce Rule 9.200(b)1 (Exhibit E), April 20, 1990 Response to Motion for Enlargement of Time (Exhibit F), and May 7, 1990 Reply to Motion to Strike Appellants' Brief and Motion to Enforce Rule 9.210(f) (Exhibit G).

On September 5, 1990, the Fourth District, again without opinion, denied

Petitioners' Motion for Rehearing and Motion for Rehearing En Banc (Exhibit H). See June 14, 1990 Motion for Rehearing and Motion for Rehearing En Banc (Exhibit I) and July 3, 1990 Reply to Response to Motion for Rehearing and Motion for Rehearing En Banc (Exhibit J).

As a result of the Fourth District's dismissal of the Appeal and denial of Petitioners' Motion for Rehearing and Motion for Rehearing En Banc, Petitioners have been denied the right to trial by jury and to appellate review since Petitioners were financially unable to post a supersedeas bond to avoid the surreptitious use of garnishment proceedings to block the preparation of the record of appeal, and, in turn, the Appeal itself.

III
THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by

this Petition is a Writ of Mandamus compelling the Fourth District to review, on its merits, Petitioner's Appeal.

IV
ARGUMENT

The Fourth District's (a) dismissal of the Appeal almost two months after the filing of the Initial Brief, without opinion, but apparently based on procedural grounds and (b) denial of the Motion for Rehearing and Motion for Rehearing En Banc, also without opinion, are an attempt by the Fourth District to avoid its ministerial duty to decide the Appeal on its merits.

Petitioners have not sought to appeal the Trial Court's findings in the Memorandum Opinion. However, this fact should not be deemed as acquiescence or admission to any portion of the Memoran-

dum Opinion since (a) Petitioners recognize that an appeal of the Trial Court's findings, in a non-jury setting, are virtually unassailable, and (b) the Fourth District, in its opinion filed January 24, 1990, in a related appeal, in Case No. 88-3012, described its former member's Memorandum Opinion as "compelling and exhaustive."

Petitioners have, however, sought to review the Trial Court's denial of Petitioner's right to trial by jury and judicial enforcement of a contract; and, to permit the Fourth District to avoid the discharge of its ministerial duty to decide the Appeal on its merits, is to deny Petitioners both the right to trial by jury and to appellate review.

Petitioners contend that (a) the applicable portion of the record on

appeal has, in fact, been prepared, (b) the Fourth District has not reviewed the Initial Brief, which was filed, promptly after the Fourth District permitted Petitioners' counsel to withdraw, (c) the Fourth District has not given Petitioners an opportunity to supplement the record, if appropriate and (d) the appropriate procedure for the Fourth District to have followed in the discharge of its ministerial duties would have been to review the Initial Brief and request Appellees, not Petitioners, to supplement the record consistent with Rule 9.200(b)1.

Accordingly, the Fourth District incorrectly exercised discretion over a matter that should have been treated as a ministerial function, namely, its determination of the Appeal on its merits, and this Court should (a) find that "the

district court improperly dismissed petitioner's appeal...(and)...the district court has a ministerial duty to consider and decide the appeal." See Sky Lake Gardens, Supra, and (b) issue a Writ of Mandamus to correct this error.

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Attorneys for Petitioners,
Palm Court, Inc., Carl A. Sax
and Lanny A. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Mandamus, and Appendix thereto, has been furnished to the District Court of Appeal for the Fourth District of the State of Florida, P.O. Box A, West Palm Beach, FL 33402 and to Michael A. Hanzman, Esq., Floyd Pearson Richman Greer Weil Zack & Brumbaugh, P.A. attorneys for Respondents, Vaughn Durham et al Courthouse Center, 26th

Floor, 175 N.W. First Avenue, Miami, FL 33128-1817 this 20th day of September, 1990.

_____

Lanny A. Horwitz, Esq.

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PALM COURT, INC., a
Florida corporation,
CARL A. SAX and
LANNY A. HORWITZ,

Petitioners,

CASE NO._____
FOURTH DISTRICT
COURT OF APPEAL
CASE NO. 88-1203

vs.

THE DISTRICT COURT
OF APPEAL FOR THE
FOURTH DISTRICT,
STATE OF FLORIDA,

Respondent.

and

VAUGHN DURHAM, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

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EXHIBIT A

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

PALM COURT, INC., et al.,

Appellants,

v. CASE NO. 88-1203

VAUGHN DURHAM, et al.,

Appellees.

APPELLANTS' INITIAL BRIEF

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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Attorneys for Plaintiff/Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz

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Argument

Point One Pg 29

THE TRIAL COURT ERRED IN DENYING PLAINTIFF/APPELLANTS, PCI, SAX AND HORWITZ A JURY TRIAL AS GUARANTEED BY THE FLORIDA CONSTITUTION.

(a) The Trial Court erred since the Action included claims cognizable at law and Plaintiff/Appellants, PCI, and/or Sax and Horwitz were entitled to a jury trial in a note/damage/fraud action.

(b) The Trial Court erred since rescission was unavailable to Defendants/Appellees, Vaughn Durham, et al. and Plaintiff/Appellants, PCI, and/or Sax and Horwitz were entitled to a jury trial in a damage action.

(c) The Trial Court erred since its Memorandum Opinion and Final Judgment have predetermined intertwined legal issues for which Plaintiff/Appellants, PCI, and/or Sax and Horwitz were otherwise entitled to a jury trial.

Point Two Pg 46

THE TRIAL COURT ERRED IN DENYING TO

PLAINTIFF/APPELLANTS, PCI, SAX AND HORWITZ JUDICIAL ENFORCEMENT OF A CONTRACT.

The Trial Court erred since PV, as agent of Defendants/Appellees, Vaughn Durham, et al. under the Management Agreement, executed the Transfer Letters which modified the PPM and obviated the Trial Court's findings.

Conclusion Pg 53

Appendix Attached

Certificate of Service Attached

TABLE OF CITATIONS

Cases

Adams v. Citizens Bank of Brevard, 248 So.2d. 682 (Fla. 4th DCA 1971)

Adler v. Seligman of Florida, Inc., 492 So.2d. 730 (Fla. 4th DCA 1986)

Beacon Theatres v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959)

Bingham et al v. Taylor, 12 F.2d 15,16 (1926)

Boston Rug Galleries, Inc. v. William Iselin & Co., 212 So.2d 58 (Fla. 4th DCA 1968)

Cerrito v. Kovitch, 457 So.2d 1021, 1022 (Fla.1984)

Cheek v. McGowan Electric Supply Co., 404 So,2d 834 (Fla. 1st DCA 1981)

Chenery v.Crans, 497 So.2d 267 (Fla.2nd DCA 1986)

Colon v. Lisk, 13 A.D. 195, 43 N.Y.S. 364, affd, 153 N.Y. 188, 47 N.E. 302 (1897)

Construction Systems, Etc. v. Jennings Const., 413 So.2d 1236, 37 (Fla. 3rd DCA 1982)

Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962)

David v. Sun Federal Savings & Loan, 461 So.2d 93 (Fla. 1984)

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Padgett v. First Federal Savings & Loan Association, 378 So.2d 58 (Fla. 1st DCA 1979)

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Phillips v. Kapus, 764 F.2d 807 (11th Cir. 1985)

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Spring v. Ronel Refining, Inc., 421 So.2d 46 (3rd DCA 1982)

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Swofford v. B & W , Inc., 336 F.2d 406 (5th Cir. 1964), cert. denied, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557

(1965)

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Waddell v. State ex rel Meeks, 235 Ark. 293, 357 S.W.2d 651 (1962)

Wiggins v. Williams, 36 Fla. 637, 18 So. 859 (1896)

Statutes

Art. I § 22, Fla. Const.

Art. I, §10, U.S. Const.

Declaration of Rights Art. I, §10, Fla. Const.

Fla.R.Civ.P. 1.430(a)

West F.S.A. Const. Art. 1, § 22

STATEMENT OF THE CASE AND FACTS

This is an appeal from a five (5) week trial, without a jury, commencing on February 16, 1988, before the Honorable Daniel T. K. Hurley, Fifteenth (15th) Judicial Circuit in and for Palm Beach County, Florida (the "Trial Court")

resulting in a memorandum opinion (the "Memorandum Opinion") (R 3543-76) and final judgment (the "Final Judgment") (R 3578-83), entered by the Trial Court on March 28, 1988, finding that Plaintiff/Appellants, Palm Court, Inc. ("PCI"), Carl A. Sax ("Sax") and Lanny A. Horwitz ("Horwitz") violated (a) §12(2) of the Securities Act of 1933, 15 U.S.C. §771(2), (b) Chapter 517, §301(1)(a)3, Fla.Stat., and (c) Chapter 517, §301(1)(a)2, Fla.Stat., relating to Counts III, IV and V, respectively, of the Revised Second Amended Counterclaim filed by Defendants/Appellees Vaughn Durham, et al. (R 2772-2825)

The Trial Court's Memorandum Opinion tracks Alna Capital Associates v. Wagner 758 F.2d. 562 (11th Cir.1985), where the Eleventh Circuit held that a trial

court's findings that a defendant had committed securities fraud would be affirmed where the trial court made careful, detailed findings which were sufficiently supported by the evidence.

Accordingly, even though Plaintiff/-Appellants, PCI, Sax and Horwitz assert that the Trial Court's findings are not sufficiently supported by the evidence, Plaintiff/Appellants, PCI, Sax and Horwitz recognize that an appeal of the Trial Court's findings, in a non-jury setting, are virtually unassailable.

Therefore, Plaintiff/Appellants, PCI, Sax and Horwitz have not sought to appeal the Trial Court's findings in the Memorandum Opinion. However, Plaintiff/-Appellants, PCI, Sax and Horwitz's failure to challenge the Trial Court's findings should not be deemed, by this Court,

as acquiescence or admission to any portion of the Memorandum Opinion.

On November 30, 1989, Plaintiff/Appellant PCI (and Sax and Horwitz), entered into a stipulation of settlement with Defendants/Appellees, Vaughn Durham, et al. (the "Stipulation of Settlement") which, "without in any way conceding to the merits of each others position," provided, in pertinent part, that:

> "PCI (and Sax and Horwitz) will not appeal any aspect of the Final Judgment or Memorandum Opinion with respect to Counts I and II of the Revised Second Amended Counterclaim, but nothing contained herein shall prohibit PCI (and Sax and Horwitz) from continuing the Appeal as aforesaid, in order to reverse the Judgment or Memorandum

> Opinion with respect to Counts III, IV and V of the Revised Second Amended Counterclaim." (Counts III, IV and V are sometimes hereinafter referred to as Counts III, XIII and XIV of the Revised Second Amended Counterclaim.)

On March 14, 1990, consistent with the terms of the Stipulation of Settlement, Plaintiff/Appellants, PCI, Sax and Horwitz filed their Amended Directions to Clerk (R 3612-18) and Statement of Judicial Acts to be Reviewed (R 3619-20), limiting the Appeal to all aspects, including the right to a jury trial, of the Trial Court's findings in the Memorandum Opinion and Final Judgment relating to Counts III, IV and V of the Revised Second Amended Counterclaim.

The Stipulation of Settlement also

provided that:

> "As to the Final Summary Judgment (in favor of those Unit Owners who were not party to the bifurcated and severed first wave trial), all of the ... Stipulations as to the Final Judgment... shall apply to the Final Summary Judgment...."

On February 8, 1989, the Trial Court entered a final judgment pertaining to the Final Summary Judgment. (R 3608-09)

Accordingly, for purposes of this Appeal, the term Final Judgment includes the final judgment pertaining to the Final Summary Judgment.

In January, 1985, Plaintiff/Appellant, PCI was formed by Plaintiff/Appellants, Sax and Horwitz, Lawrence Reger ("Reger") and Southern Floridabanc Savings Association ("SFB") to (a) purchase

a Palm Beach property (the "Hotel"), and (b) renovate and syndicate the Hotel under either a limited partnership or hotel/condominium offering.

In March, 1985, Plaintiff/Appellants, PCI, Sax and Horwitz retained the services of Sparber, Shevin, Shapo, Heilbronner and Book, P.A. ("Sparber") and Cohen, Scherer and Cohn, P.A. ("Cohen"), as securities and real estate counsel, respectively, and Pannell Kerr Forster ("PKF"), as hotel feasibility consultants.

On June 30, 1985, a private placement memorandum prepared by Sparber, as amended by the October 15, 1985 Addendum, and subscripton documents relating thereto (the "PPM") (R 3219-3429), was printed for distribution to broker/dealers licensed to sell securities in those states

blue-skyed by Sparber in accordance with applicable state and federal securities laws.

In November, 1985, Plaintiff/Appellant, PCI retained the services of Richard Strother, Strother Investments, and Frederick Randal, First Hampshire Securities, Inc., a licensed broker/dealer ("First Hampshire") to sell the Units in the Hotel.

On December 29 and 30, 1985, at the offices of Cohen and SFB, Plaintiff/Appellants, PCI, Sax and Horwitz, Andrew Jacobson, Esq. of Cohen's office, representatives of SFB, Mr. Strother, Mr. Randal and Geoffrey Chalmers, Esq., Grey and Wendell, Boston, MA, assembled, in Boca Raton, Florida, to close the $13,900,000 hotel/condominium offering (the "Closing").

Immediately after all parties were assembled, Mr. Chalmers (a) announced, after he delivered several million dollars of deposits, notes, and other closing documents, that he represented Defendants/Appellees, Vaughn Durham, et al. and (b) thereafter, attempted to negotiate a reduction to the purchase price of the interests in the Hotel (the "Units"), since the Hotel, after Mr. Chalmers' morning inspection, was not, in Mr. Chalmers opinion, complete, and PV Hotels, Inc., the Hotel Agent ("PV") had not obtained significant pre-bookings for the 1986 season.

After Plaintiff/Appellants, PCI, Sax and Horwitz refused to reduce the purchase price of the Units, Messrs. Strother and Chalmers, on behalf of Mr. Chalmers' clients, proceeded to close the

purchase of the Units in the Hotel.

At the first wave trial, although both Plaintiff/Appellants, Sax and Horwitz and Mr. Jacobson testified to the foregoing, the Defendants/Appellees, Vaughn Durham, et al. asserted that the Plaintiff/Appellants, PCI, Sax and Horwitz knew that Mr. Chalmers, in fact, represented First Hampshire, and not the Defendants/Appellees, Vaughn Durham, et al. and that, in any event, Mr. Chalmers did not have actual authority to bind Defendants/Appellees, Vaughn Durham, et al. to any modification to the PPM.

All Closing documentation was assembled by Mr. Jacobson in consultation with various partners and/or associates of Sparber, under the supervision of Mr. Chalmers.

As is customary in limited partner-

ship offerings, prospective limited partners did not attend a Closing since securities and/or real estate counsel, namely Sparber and Cohen,were required to opine to compliance with Closing conditions.

Accordingly, Sparber acted as escrow agent and Cohen acted as sub-escrow agent to assure Plaintiff/Appellant, PCI's compliance with Closing conditions set forth in the escrow agreement contained in the PPM (the "Escrow Agreement") (R 3058-63), and issued legal opinion letters that the Closing complied with the PPM.

During the first wave trial, both Sparber, who had elected not to attend the closing since Mr. Chalmers was present, and Defendants/Appellees, Vaughn Durham, et al. sought to rely upon Plain-

tiff/Appellant, PCI's representations in an incumbency certificate (the "Incumbency Certificate"). (R 3151-53)

However, (a) the Incumbency Certificate was a First Hampshire requirement, (b) Sparber was not delivered a copy of the Incumbency Certificate until after the Closing, and (c) Cohen modified the Incumbency Certificate at the Closing, prior to its execution by Plaintiff/-Appellant, PCI and its review by Mr. Chalmers.

Since Plaintiff/Appellants, PCI, Sax and Horwitz, and, for that matter, its counsel, Sparber and Cohen, believed that Mr. Chalmers represented the Defendants/-Appellees, Vaughn Durham, et al., certain agreements were reached at the Closing with Messrs. Strother and Chalmers, which were memorialized in two (2) letters

dated December 30, 1985 and December 31, 1985 (R 3073-3138 and R 3147-50), which were executed, on behalf of the Defendants/Appellees, Vaughn Durham, et al., by PV, the agent of the Defendants/Appellees, Vaughn Durham, et al. under various Rental Management Agreements (R 3357-65) which had been executed and delivered to Sparber or Cohen on or before the Closing. (The Transfer Letters are reproduced in the Appendix.)

Contemporaneously with the Closing, PV donated the facade of the Hotel to the Palm Beach Preservation Society (the "Facade Easement Donation") in order to secure a multi-million dollar charitable tax deduction for Defendants/Appellees, Vaughn Durham, et al.

The Facade Easement Donation was not part of the offering of Units, and the

tax benefits flowing to the Defendants/-Appellees, Vaughn Durham, et al. were not included within the PKF forecasts contained in the PPM (the "Forecasts"). The donation was, however, part of the unauthorized investment summary (the "Investment Summary") prepared and distributed by Strother Investments and First Hampshire. (R 3165-98)

Plaintiff/Appellants, PCI, Sax and Horwitz believe that the Action and the Revised Second Amended Counterclaim would not have been filed, but for the following; (a) Mr. Strother prepared the Investment Summary, (b) Mr. Strother directly, or indirectly sold the Units in the Hotel to Defendants/Appellees, Vaughn Durham, et al., (c) Messrs. Strother and Chalmers closed the offering on behalf of the Defendants/Appellees, Vaughn Durham,

et al., (d) Messrs. Strother and Chalmers reviewed and approved the Transfer Letters prior to their execution by PV on behalf of Defendants/Appellees, Vaughn Durham, et al., (e) Mr. Strother was elected president of the condominium association, (f) Mr. Chalmers was retained as counsel to the condominium association, (g) the Defendants/Appellees, Vaughn Durham, et al., in actuality, purchased the Units under the Investment Summary and not the PPM, and (h) Messrs. Strother and Chalmers retained the firm of Floyd, Pearson, Richman, Weil, Zack & Brumbaugh to defend the Action and to bring the securities claims against Plaintiff/Appellants, PCI, Sax and Horwitz, among others.

Indeed, this opinion was shared by Carteret in commenting on the necessity

of Mr. Strother's trial appearance (he did not appear since the Trial Court denied Plaintiff/Appellants, PCI, Sax and Horwitz's motion to include Mr. Strother within the class of ten (10) purchasers selected, over Plaintiff/Appellants, PCI, Sax and Horwitz's objection (R 196) by Defendants/Appellees, Vaughn Durham, et al. to appear at the first wave trial):

> "Judge, you can't because Mr. Strother's testimony in this case is so relevant. You have to understand what he was. Not, only, was he the seller of the deal, whatever, he became the president of the condo association. He was the one who made the decision to close this hotel. He was the one who made the decision to retain Mr. Richman (counsel to Defendants/Appellees, Vaughn Durham, et al.), and he was the

> one who in my opinion started the whole ball rolling." (R 207-08)

As part of the documentation delivered by Mr. Chalmers at the Closing, Defendants/-Appellees, Vaughn Durham, et al. executed, inter alia, first mortgages (the "Mortgages") and first mortgage notes ("Notes"), representing eighty (80%) per cent of the purchase price of the Units, in favor of SFB, and two (2) additional promissory notes, representing ten (10%) and three (3%) per cent of the purchase price of the Units, in favor of Plaintiff/Appellant, PCI (the "10% Note" and "3% Note").

As an accommodation to both Plaintiff/Appellant, PCI and SFB, Plain tiff/Appellant, PCI, SFB and Carteret entered into (1) a Substitution of Collateral and Collateral Assignment and

Security Agreement (the "Collateral Assignment") and (2) Buy - Sell and Tri-Party Agreement (R 3541-42) (the "Tri-Party Agreement"), under which (a) Carteret substituted its first mortgage encumbering the Hotel by accepting a collateral assignment of the Notes and Mortgages, and (b) SFB unconditionally agreed to purchase the Notes and Mortgages from Carteret approximately one (1) year after the Closing.

As partial payment for fee and other expense reimbursements, Plaintiff/Appellant, PCI, at the Closing, assigned the 3% Notes to Strother Investments.

In addition, at the Closing, Plaintiff/Appellant, PCI disbursed, as sales commissions, to First Hampshire and other broker dealers the 7% down payment received from Defendants/Appellees, Vaughn

Durham, et al.

In order to close the sale of the hotel/condominium offering, each of the four (4) participants in Plaintiff/Appellant, PCI, namely, Plaintiff/Appellants, Sax and Horwitz, Reger and SFB, advanced $225,000, or $900,000 in the aggregate, and Reger, on Plaintiff/Appellants, PCI, Sax and Horwitz's behalf, arranged for a $938,250 letter of credit (the "Letter of Credit"), one of the requirements of the PPM.

Plaintiff/Appellants, PCI, Sax and Horwitz believe that the Trial Court's findings are not sufficiently supported by the evidence, in part, since it is not logical to find fraud where the sponsors go out of pocket nearly $2 million at Closing.

Before Defendants/Appellees, Vaughn

Durham, et al. defaulted on either the Notes or the 10% Notes, Plaintiff/Appellant, PCI sold the 10% Notes to SFB to defray unpaid costs to either complete the renovation of the Hotel or satisfy the terms of the PPM.

In early 1986, Plaintiff/Appellant, PCI turned over control of the condominium association to Defendants/Appellees, Vaughn Durham, et al., subject to the Rental Management Agreements with PV, under which PV continued to operate the Hotel for the benefit of Defendants/-Appellees, Vaughn Durham, et al.

Almost immediately thereafter, Defendants/Appellees, Vaughn Durham, et al. (a) ceased making payments under the Notes and 10% Notes, (b) canceled the insurance for the Hotel and (c) undertook to close and abandon the Hotel.

After various meetings with both Carteret (collateral assignee of the Notes and Mortgages under the Collateral Assignment) and SFB (purchaser of the 10% Notes), Plaintiff/Appellant, PCI filed, on April 24, 1986, an action (the "Action") seeking foreclosure of the Mortgages, and collection upon the Notes.

The Action, which was filed by Botos & Oliver, P.A. ("Botos"), provided that Plaintiff/Appellant, PCI owned the Mortgages and Notes.

On April 25, 1986, at Plaintiff/-Appellant, PCI's request, the Trial Court appointed Michael Scheinvold, a Fort Lauderdale attorney, as receiver of the Hotel.

In April, 1986, the Defendants/Appellees, Vaughn Durham, et al. attempted to draw down the Letter of Credit, which had

been provided to subsidize, in part, Plaintiff/Appellant, PCI's Forecasts.

In April, 1986, with Plaintiff/Appellant, PCI's cooperation and consent, the Letter of Credit was drawn down by Mr. Scheinvold in order for the Hotel to continue its operations.

On June 26, 1986 the Action was amended by the filing of an amended complaint (the "Amended Complaint"). (R 2228-75)

On July 25, 1986, the Defendants/-Appellees, Vaughn Durham, et al. filed a Counterclaim (R 2276-2316) against Plaintiff/Appellant, PCI, and its officers, directors and principal shareholders, Sax and Horwitz, and Cohen, among others, claiming, inter alia, that Plaintiff/-Appellants, PCI, Sax and Horwitz violated (a) §12(1) and (2) of the Securities Act

of 1933, 15 U.S.C. §771(1) and (2), and (b) Chapter 517, Fla.Sta. §301(1)(a)2 and 3, entitling Defendants/Appellees, Vaughn Durham, et al. to rescission, damages and attorney's fees.

Sparber was added as a party by the November 15, 1986 Amended Counterclaim. (R 2333-79); and, PKF and Carteret were added as parties at a later date. The claims against such parties are set forth in the December 31, 1987 Revised Second Amended Counterclaim. (R 2772-2825)

On September 12, 1986, Plaintiff/-Appellant, PCI entered into a stipulation with Defendants/Appellees, Vaughn Durham, et al. in order to operate the Hotel pending resolution of the Action.

On September 26, 1986, Carteret brought separate actions to foreclose on

the Mortgages only, one of which was Case No. 86-9123-C(L)F. (R 3621-45)

Carteret brought its separate actions, notwithstanding (a) the filing of the Initial Actions by Botos, common counsel to both Plaintiff/Appellant, PCI and Carteret, (b) the preparation of a redelivery agreement dated April, 1986 (the "Redelivery Agreement") by Botos, (c) the execution and delivery of the Redelivery Agreement by Plaintiff/Appellants, PCI, Sax and Horwitz and Reger, (d) the authority under the Redelivery Agreement for Plaintiff/Appellant PCI to commence the Action, and (e) the unavailability of the Statute of Frauds as a defense to the binding nature of the Redelivery Agreement.

On December 24, 1986, Carteret moved to intervene in the Action (the "Motion

to Intervene"). (R 2380-82)

On February 12, 1987, the Trial Court bifurcated the Action by its Order on Case Management Conference (the "Bifurcation Order") by limiting the initial wave to issues raised between Plaintiff/Appellant, PCI (as later defined, at the Pretrial Conference, to include Sax and Horwitz) and Defendants/Appellees, Vaughn Durham, et al., thereby severing Plaintiff/Appellants, PCI, Sax and Horwitz's and Defendants/Appellees, Vaughn Durham, et al.'s claims, cross-claims and counterclaims against SFB, Sparber, Cohen, and PKF among others, from the first wave trial.

In early 1987, Carteret exercised its right, under the Tri-Party Agreement, to cause SFB to purchase the Notes and Mort gages, which were then in default. SFB,

however, refused to comply with the Tri-Party Agreement, which later became the subject of ancillary litigation which was disposed of as part of the Mid-Trial Settlement (as hereinafter defined).

Thereafter, Plaintiff/Appellant, PCI filed a Chapter 11 petition before the United States Bankruptcy Court for the District of South Carolina. However, the bankruptcy court refused to take jurisdiction, after Defendants/Appellees, Vaughn Durham, et al. succeeded in vilifying Plaintiff/Appellants, Sax and Horwitz.

On June 16, 1987, the Trial Court granted Plaintiff/Appellants, PCI, Sax and Horwitz's Emergency Motion to Reinstate Receiver, after which Plaintiff/-Appellant, PCI delivered the Hotel to Mr. Scheinvold, who, in turn, redelivered

the Hotel to Defendants/Appellees, Vaughn Durham, et al., who closed the Hotel immediately thereafter.

On July 28, 1987, Plaintiff/Appellants, PCI, Sax and Horwitz and Carteret entered into a stipulation (the "Stipulation") (R 2544-45) to dispose of a motion regarding redelivery of the Notes, which, inter alia, substituted Carteret for Plaintiff/Appellant, PCI in the foreclosure counts of the Action, and provided that:

> "Carteret and my clients, PCI, Sax and Horwitz, have agreed to dispose of ... the motion regarding redelivery of the notes by withdrawing same without prejudice to our right to refile in the event the settlement agreement to be announced hereafter becomes untenable and agreeing that Carteret shall be permitted to

> pursue and enforce the foreclosure case against the unit owners, and Holland & Knight at Carteret's expense, shall act as lead counsel for both Carteret and PCI, Sax and Horwitz in the prosecution of the foreclosure action .... (R 2544-45)
>
> Neither Carteret nor Holland & Knight shall have a right to compromise or prejudice the foreclosure action against the unit owners and/or the balance of the recovery otherwise due PCI without the consent of PCI, Sax and Horwitz" (R 2545-46).

In August, 1987, Carteret sought to declare the Stipulation untenable.

On August 28, 1987, Carteret amended and consolidated its foreclosure cases by filing an amended complaint. (R 3646-3704) (R 2763-64)

Carteret's amended complaint requested a foreclosure sale in its claim for relief, and was not an action on the Notes. (R 3703-04)

On October 5, 1987, the Trial Court consolidated Carteret's foreclosure action into the Action (the "Substitution Order"). (R 2763-64)

Although the Substitution Order resulted from the Stipulation, the Trial Court, after Carteret sought to declare the Stipulation untenable, did not (a) unwind the Substitution Order and permit Plaintiff/Appellant, PCI to pursue its foreclosure case against the Defendants/-Appellees, Vaughn Durham, et al. under the terms of the Redelivery Agreement or (b) permit Plaintiff/Appellant, PCI to try the Note Counts (as hereinafter defined) as requested under the Plain-

tiff/Appellant, PCI's Motion to Try Certain Counts of Palm Court's Complaint (R 3013-15), which was never ruled upon by the Trial Court.

On December 31, 1987, Defendants/-Appellees, Vaughn Durham, et al. filed the Revised Second Amended Counterclaim (R 2772-2825), upon which the Trial Court based its Memorandum Opinion and Final Judgment.

On January 20, 1988, the Trial Court, by its Order on Palm Court, Inc.'s Motion and Renewed Motion to Compel Redelivery, denied Plaintiff/Appellant, PCI's demand that Carteret redeliver the Notes in accordance with the terms of the Redelivery Agreement.

On February 3, 1988, at the Pretrial Conference and on the first day of the first wave trial, the jury/non-jury issue

was discussed among counsel to Plaintiff/Appellants, PCI, Sax and Horwitz, Defendants/Appellees, Vaughn Durham, et al. and Carteret (R 6, 7, 72-76, 78, 84, 102, 104-06, 110-13, 115-25, 172, 222, 225-26, 231, 257-58, 260-61).

Carteret supported Plaintiff/Appellants, PCI, Sax and Horwitz's request for a jury trial, albeit for different reasons.

Initially, Carteret was a conterdefendant under Count VII of Defendants/-Appellees, Vaughn Durham, et al.'s Revised Second Amended Counterclaim, which alleged that Carteret aided and abetted Plaintiff/Appellants, PCI, Sax and Horwitz's securities violations. (R 3729-30)

In addition, at the Pretrial Conference, Defendants/Appellees, Vaughn Dur-

ham, et al. dismissed, by Motion to Amend Revised Second Amended Counterclaim, all Counts of the Revised Second Amended Counterclaim, except for Counts I, II, III, XIII, XIV and XXII.

On February 16, 1988, the first day of the first wave trial, after Carteret stated:

> "in order to resolve all the matters at this time pending against my client, we'll waive the trial by jury on that count" (R 258),

and Defendants/Appellees, Vaughn Durham, et al. stated:

> "We are willing to waive (trial by jury)" (R 259),

the Trial Court found, over Plaintiff/Appellants, PCI, Sax and Horwitz's renewed request for a jury trial, and objection to a bench trial, that:

"I am relying on Judge Wiggington's opinion, the 1972 opinion by the First District Court of Appeals where the Court indicated that rescission is an equitable remedy and that when equity takes a proceeding that the Court has the ability then to resolve all other issues that are involved. There is, too, the Federal Circuit Court of Appeals' opinion from the Eleventh Circuit, I believe, that reviewed Judge Aronovitz's decision where he tried a rescission claim in a securities fraud case and the Court again indicated that that was an equitable action and that under federal law rescission is to be tried by the Court and not a jury, so for all of the cases that were submitted and which support that proposition and which I will dictate into the record at a

> later time, I will deny Palm Court, Inc.'s objection to having the case tried without a jury and I will try those Counts before the Court." (R 261).

In addition, on the first day of the first wave trial, the Trial Court denied Plaintiff/Appellants, Sax and Horwitz's request that they be excluded from the first wave trial. (R 265)

On the first day of the first wave trial, the following counts were pending in Plaintiff/Appellants, PCI, Sax and Horwitz's Amended Complaint, and Defendants/Appellees, Vaughn Durham, et al.'s Revised Second Amended Counterclaim:

Amended Complaint

Counts 67-103 Judgment on Adjustable Rate Notes (the "Note Counts (R 2240-44)

Count 141 Cancellation of Reinstatement Rights (R 2243)

Count 142 Cancellation of Puts (R 2243)

Count 145 Improper Interference with Hotel Management (R 2246)

Count 146 Tortious Interference with Contractural Rights (R 2247)

Count 149 Improper Drawings on Escrow Fund (R 2249-50)(collectively "Counts 141-149")

Revised Second Amended Counterclaim

Count I Rescission Based Upon Non-Registration (R 3711-13)

Count II Violation of §12(1) of the Securities Act of 1933, 15 U.S.C. §771(1) (R 3713-14)

Count III Violation of §12(2) of the Securities Act of 1933, 15 U.S.C. §771(2) (R 3714-22)

Count XIII First Violation of Florida Statutes §517, et seq. (R 3737-38)

Count XIV Second Violation of Florida Statutes §517.301 (R 3739-40)

Count XXII Declaratory Relief (R 3750-51)

The Trial Court, (a) in the Bifurcation Order, severed from the first wave

trial, Plaintiff/Appellants, PCI, Sax and Horwitz's claims against Sparber, Cohen, PKF, among others, (b) in the Substitution Order, consolidated Carteret's amended complaint with the Action, thereby substituting Carteret's foreclosure counts for Plaintiff/Appellant, PCI's Counts 104-140 - Foreclosure of Mortgages for Non-Payment (R 2241-43, 2763-64), and (c) during the Pretrial Conference, granted Defendants/Appellees, Vaughn Durham, et al.'s motion to dismiss all Counts of the Revised Second Amended Counterclaim which unequivocally required a trial by jury (the "Dismissal Motion"). (R 3000-05)

The Trial Court did not, however, strike Plaintiff/Appellants, PCI, Sax and Horwitz's Note Counts or Counts 141-149.

Just prior to the Mid-Trial Settle-

ment (as hereinafter defined), the Trial Court, at its suggestion, over Carteret's objection, permitted Defendants/Appellees, Vaughn Durham, et al. to amend, ore tenus, their Revised Second Amended Counterclaim (the "Order Amending Complaint"), to (a) include Carteret as a co-defendant in the other Counts of the Revised Second Amended Counterclaim, and (b) subject Carteret, in the event of an unfavorable verdict, to a multi-million dollar judgment claim.

As a direct result of the Order Amending Complaint, Carteret, SFB and the Defendants/Appellees, Vaughn Durham, et al., on March 8, 1988, entered into a mid-trial settlement (the "Mid-Trial Settlement"), under which Defendants/-Appellees, Vaughn Durham, et al. exercised dominion and control over the Hotel

by deeding their Units to a wholly owned subsidiary of Carteret in exchange for (a) satisfaction of the Mortgages, and (b) cancellation of a portion of the Notes equal to the outstanding balance due under Plaintiff/Appellant, PCI's construction loan note to Carteret.

Plaintiff/Appellants, PCI, Sax and Horwitz strenuously objected to the Mid-Trial Settlement, and caused the following motion to be read into the record, at that time:

> "We move to dismiss the remaining Unit Owner claims against Palm Court, Inc., Sax and Horwitz being counts 1, 2, 3, 13, 14 and 22.
>
> All those counts except count 22 seek rescission and damages related to rescission if granted.

It is clear that the Unit Owners and Carteret have made a binding agreement on record enforceable by this Court under which the Unit Owners are conveying title to the Hotel property to Carteret and that Carteret has agreed to pay certain consideration for the deeds acceptable to the Unit Owners. It is also clear that Palm Court, Inc., Sax and Horwitz have not consented to the transaction.

Under these circumstances it is clear the rescission demanded by the Unit Owners is no longer a legal possibility.

There is no way they can tender title to the Hotel back to Palm Court, Inc. and restore the parties to their status before 12/31/85. The Unit Owners have knowingly made an election to transfer their title to the Hotel property to

Carteret in return for the elimination of all their risk on the Notes and Mortgages to the extent Carteret held them, plus an additional $50,000.

This being so and since the Unit Owners can no longer tender title to the Hotel property to Palm Court, Inc., in the event they succeeded in the Action here, their counts for rescission and damages related to rescission must fail and require dismissal.

The remaining count against Palm Court, Inc, Sax and Horwitz, Count 22, seeks declaratory relief contending that certain conditions precedent to the closing of the deal in December, 1985 were not met. The count further argues that by reason thereof no deal was consummated and that the Unit Owners have no

obligation to pay the Notes. Count 22 further claims there is a justiciable controversy because of the doubt as to whether the transaction was consummated and the counter claimants are entitled to have their rights declared.

By electing to sell or transfer the property to Carteret without our consent in return for the consideration they have accepted, the Unit Owners most certainly have recognized and asserted ownership of the property. They are therefore hardly in a position to claim that no deal was consummated in December, 1985. They have exercised dominion and control over the title they acquired in a transaction in which they themselves have now affirmed and there is nothing left for this Court to determine under Count 22."

The Trial Court summarily denied all of Plaintiff/Appellants, PCI, Sax and Horwitz's requests (the "Mid-trial Settlement Order").

The Hotel remained closed and under possession of Defendants/Appellees, Vaughn Durham, et al. until the Mid-Trial Settlement when it was transferred by the Defendants/Appellees, Vaughn Durham, et al. to Carteret Palm Court, Inc., a wholly owned subsidiary of Carteret.

On March 28, 1988, the Trial Court handed down the Memorandum Opinion and Final Judgment, finding, as a matter of fact and law, that Plaintiff/Appellants, PCI, Sax and Horwitz violated (a) §12(2) of the Securities Act of 1933, 15 U.S.C. §771(2), (b) Chapter 517, Fla.Sta. §301(1)(a)3, and (c) Chapter 517 Fla. Sta. §301(1)(a)2, relating to Counts

III, IV and V, respectively, of the Revised Second Amended Counterclaim.

On April 8, 1988, Plaintiff/Appellants, PCI, Sax and Horwitz filed (a) a Motion for Stay of Execution of Final Judgment (R 3584-85), (b) a Motion for Stay of Second Wave Trial Pending Appeal (R 3586-87), (c) a Motion to Set Aside Final Judgment (R 3588-89), and (d) a Motion for New Trial or for Rehearing (R 3590-98), and on April 18, 1988 Plaintiff/Appellants, PCI, Sax and Horwitz filed a Motion for Stay of Settlement, Motion for Reduction of Final Judgment and Motion to Off Set Against Final Judgment, all of which were summarily denied by the Trial Court on April 25, 1988. (R 3602-07)

This Appeal was timely filed on May 3, 1988, to review Counts I, II, III,

VIII, XIV and XXII of the Revised Second Amended Counterclaim filed by Defendants/Appellees, Vaughn Durham, et al., as limited, by the Stipulation of Settlement, to Counts III, IV and V of the Revised Second Amended Counterclaim.

SUMMARY OF THE ARGUMENT

The Appeal involves two (2) questions of constitutional dimension, namely, (a) whether the Trial Court denied Plaintiff/Appellants, PCI, and/or Sax and Horwitz the right to trial by jury, and (b) whether the Trial Court denied Plaintiff/Appellants, PCI, Sax and Horwitz's right to judicial enforcement of a contract.

Point One

The Trial Court Erred in Denying Plaintiff/Appellants, PCI, and/or Sax and

Horwitz a Jury Trial as Guaranteed by the Florida Constitution.

Plaintiff/Appellants, PCI, and/or Sax and Horwitz were denied a jury trial since:

(1) The Trial Court failed to properly consider the claims of Plaintiff/-Appellants, PCI, Sax and Horwicz under the Note Counts and Counts 141-149 of the Amended Complaint, since (a) Plaintiff/-Appellant, PCI, (i) brought the Action under the authority of the Redelivery Agreement, (ii) entered into the Stipulation and did not prosecute the foreclosure case against the Defendants/Appellees, Vaughn Durham, et al. as a result of the Substitution Order, and (iii) did not waive its claims under the Note Counts and/or Counts 141-149 of the Amended Complaint, which were pending

throughout the first wave trial, and (b) the Trial Court did not strike the Note Counts under either the Substitution Order or the Motion to Try Certain Counts of Palm Court's Complaint. Accordingly, Plaintiff/Appellants, PCI, and/or Sax and Horwitz were denied a jury trial in a note, damage and fraud action.

(2) The Trial Court failed to properly determine whether rescission was available to Defendants/Appellees, Vaughn Durham, et al. under the Revised Second Amended Counterclaim either (a) at the beginning of the first wave trial or (b) after the Mid-Trial Settlement, since Plaintiff/Appellant, PCI could not be returned to the status quo ante if rescission was granted by the Trial Court, in which event, the claims of the Defendants/Appellees, Vaughn Durham, et al.

were, in fact, for monetary damages. Accordingly, Plaintiff/Appellants, PCI, and/or Sax and Horwitz were denied a jury trial in a damage action.

(3) The Trial Court failed to properly consider the effect of its Bifurcation Order since Plaintiff/Appellants, PCI, Sax and Horwitz have been denied a jury trial on their claims against Sparber, Cohen, PKF, and others.

Point Two

The Trial Court Erred in Denying to Plaintiff/Appellants, PCI, Sax and Horwitz Judicial Enforcement of a Contract.

Plaintiff/Appellants, PCI, Sax and Horwitz were denied judicial enforcement of their contract with Defendants/Appellees, Vaughn Durham, et al., since the Trial Court ignored the legal effect of

the Transfer Letters.

ARGUMENT

Point One

The Trial Court Erred in Denying Plaintiff/Appellants, PCI, and/or Sax and Horwitz a Jury Trial as Guaranteed by the Florida Constitution.

Plaintiff/Appellants, PCI, and/or Sax and Horwitz's right to trial by jury, as guaranteed by the Florida Constitution, was denied.

The Florida Constitution provides that: "The right of trial by jury shall be secure to all and remain inviolate." Art. I § 22, Fla. Const. (1968). See also, the Florida Rules of Civil Procedure which provide that: "The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate." Fla.R.Civ.P.

1.430(a).

Although a trial by jury is constitutionally guaranteed, however, "the right to a jury trial, in the absence of a specific statutory authorization, depends upon whether the nature of the cause of action is legal or equitable." Cerrito v. Kovitch, 457 So.2d 1021, 1022 (Fla.1984).

Therefore, the threshold question is whether or not the Action was legal or equitable.

In order to answer the foregoing question, it is necessary to review the Counts of both the Amended Complaint and the Revised Second Amended Counterclaim, pending throughout the first wave trial.

Plaintiff/Appellants, PCI, Sax and Horwitz's Amended Complaint contained the Note Counts and Counts 141-149, since the Substitution Order substituted Carteret's

foreclosure counts and did not strike the Note Counts brought under the Redelivery Agreement, and Plaintiff/Appellant, PCI did not waive the right to bring claims under the Note Counts by virtue of the Stipulation, which only enabled Carteret to pursue and enforce the foreclosure case against the Defendants/Appellees, Vaughn Durham, et al., without prejudice to Plaintiff/Appellants, PCI, Sax and Horwitz's recovery against the Defendants/Appellees, Vaughn Durham, et al.

In addition, the Trial Court, during the Pretrial Conference, said: "My intent was to try everything that involves the first wave parties" (R 7) and "I think we agreed that all of the claims among the parties would be resolved." (R 137)

In Spring v. Ronel Refining, Inc., 421 So.2d 46 (3rd DCA 1982), a case

clearly analogous to the instant case, where respondent brought an action seeking to foreclose a mortgage, petitioners filed an answer, affirmative defenses, and a counterclaim seeking damages for fraud, misrepresentation and cancellation of the note and mortgage, a writ of certiorari was granted because the trial court denied the petitioner a jury trial:

> "In setting the cause for non jury trial, the trial court departed from the essential requirement of law. Foreclosure is a traditional equitable remedy as is the counterclaim for cancellation. It is equally unassailable that the counterclaim for fraud and misrepresentation presents a legal claim for which the petitioners were entitled to a jury trial. The mixture of equitable and legal claims in the same case cannot

deprive a party of its right to a jury trial of issues traditionally triable to a jury. Padgett v. First Federal Savings & Loan Association of Santa Rosa County, 378 So.2d. 58 (Fla. 1st DCA 1979) and the cases cited therein. The more difficult question, however, is the order in which these issues must be tried. In Adams v. Citizens Bank of Brevard, 248 So.2d. 682 (Fla. 4th DCA 1971), the court held:

'(I)f a compulsory legal counterclaim entitles the counter-claimant to a jury trial on issues which are not common to any issues which are not common to any issue made by the equitable complaint, the trial court should proceed to try the equitable issue nonjury with appropriate provision made for a jury trial as to the law issues if disposition of the equitable issues does

not conclude the case. Southwestern Life Insurance Co. v. Gerson [187 So.2d. (Fla.3d DCA 1966)]. But where the compulsory counterclaim entitles the counterclaimant (upon timely demand) to a jury trial on issues which are sufficiently similar or related to the issues made by the equitable claim that a determination by the fact finder would necessarily bind the latter one, such issues may not be tried nonjury by the court since to do so would deprive the counterclaimant of his constitutional right to trial by jury. 248 So.2d at 684.'

Moreover,

"where both legal and equitable issues are presented in a single case 'only under the most imperative circumstances... can the right to a jury trial of legal issues be lost through prior

> determination of equitable claims... (and), (w)hat is essentially an equitable cause of action cannot be transformed into a legal cause of action simply by the use of legal terminology in the complaint." Cerrito, supra, at 1022-23
>
> In the present case, we find that the issues in the fraud claim are sufficiently similar to the issues in the foreclosure action so as to first require a jury trial of the legal claim. If, after the jury verdict, there are unrelated equitable issues remaining, the trial court may then consider those claims. Padgett, supra, at 64; Adams, supra, at 685."

Under the foregoing authority, Plaintiff/Appellants, PCI, and/or Sax and Horwitz had an unequivocal right to trial by jury since the legal and equita-

ble issues were intertwined" (Cheek v. McGowan Electric Supply Co., 404 So,2d 834 (Fla. 1st DCA 1981), and the Action involved:

> (a) "an action on a note executed in connection with a mortgage (which is) an action at law as to which defending parties are entitled to a trial by jury as a matter of right. West F.S.A. Const. Art. 1, § 22." Hobbs v. Florida First Nat. Bank, 480 So.2d 153 (Fla.App. 1 Dist. 1985): and,
>
> (b) "an action for the recovery of money as damages was among the class of cases in which common law afforded a right of jury trial. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Waddell v. State ex rel Meeks, 235 Ark. 293, 357 S.W.2d 651 (1962) " Smith v. Barnett Bank

of Murray Hill, Fla.App. 350 So.2d 358,359 (1977); and,

(c) "(W)hether or not a fraud has been shown to exist in a given case is, as a general rule, a question of fact for the jury." Fl. East Coast Railroad v. Thompson, 93 Fla. 30, 111 So. 525 (1927).

Since the equitable claims pending on the first day of the first wave trial, if any, determined the pending legal claims both in the Amended Complaint and the Revised Second Amended Counterclaim, the Trial Court should have tried all counts in the same action before a jury (see General Investment Company of Connecticut, Inc. v. Ackerman, 37 F.R.D. 38 (1964)), and this Court should find that:

The Trial Court failed to properly consider the claims of Plaintiff/Appellants,

PCI, Sax and Horwitz under the Note Counts and Counts 141-149 of the Amended Complaint, since (a) Plaintiff/Appellant, PCI, (i) brought the Action under the authority of the Redelivery Agreement, (ii) entered into the Stipulation and did not prosecute the foreclosure case against the Defendants/Appellees, Vaughn Durham, et al. as a result of the Substitution Order, and (iii) did not waive its claims under the Note Counts, and/or Counts 141-149 of the Amended Complaint, which were pending throughout the first wave trial, and (b) the Trial Court did not strike the Note Counts under either the Substitution Order or the Motion to Try Certain Counts of Palm Court's Complaint.

Additionally, although rescission is an equitable remedy, and is to be tried,

together with all other issues, by the court, rescission was not an available remedy on the first day of the first wave trial since (a) all parties required for the Trial Court to grant rescission, were not, in fact, before the Trial Court or, for that matter, joined as counterdefendants in the appropriate counts of the Revised Second Amended Counterclaim, and (b) the Defendants/Appellees, Vaughn Durham, et al. were not capable of redelivering the Hotel in the condition it was in on the day of Closing since the Defendants/Appellees, Vaughn Durham, et al., by and through their agent PV, had exercised dominion and control over the Hotel, on the day of Closing, by making the Facade Easement Donation.

First, SFB, the holder of the 10% Notes, and Strother Investments, the

holder of the 3% Notes, were not first wave parties.

Additionally, Carteret was not joined in the "rescission" Counts, as a co-counterdefendant, until the Order Amending Complaint.

As Carteret stated at the Pretrial Conference:

> "The thing that the Court - Mr. Hanzman (attorney for the Defendants/Appellees, Vaughn Durham, et al.) is not telling and the court doesn't seem to get is that they want rescission, but Palm Court, Inc. doesn't own those notes anymore, Carteret does. Southern Floridabanc owns the other purchasers' notes. They want to come and tell you, your Honor, hat we want total rescission. You can't get it from Mr. Sax or Mr. Horwitz or Palm Court, Inc. They

can't get it because Southern Floridabanc now has a separate lawsuit and is holding ten percent notes and Carteret is holding the mortgage notes. Their remedy, Judge, and they don't want to admit it to you, is damages because Palm Court, Inc. can't put them back to where they were at the beginning of the transaction...(w)e're all here under (a) mirage and that mirage is that they can rescind this total transaction through trial with you. That is not the case...you have (to have) all the parties before you. All you (do is to) give them money damages to make them whole...so you can't give them rescission. That can't get it, Judge...their real remedy is rescissionary damages. That's the only thing left to put them back whole, and that seems to be the thing that's missed ...

> rescission is putting people back to where they were before the deal uncorked...' (R 123-24) (See also R 321-33)

Second, the cases relied upon by the Trial Court (R251-52) in justifying a non-jury trial in a "rescission" setting are inapplicable and distinguishable.

The first case relied upon by the Trial Court, Davis v. McGahee, Fla. 257 So.2d. 62, 63, involves a claim where issues raised by an original and first amended complaint for rescission were amended after the case had been set for non-jury trial by the filing of a second amended complaint claiming compensatory and punitive damages.

In that case the court found that:

> "It is undisputed that the issues raised by the original and first amended complaint filed by

> petitioners, as joined by the answers and counterclaims thereto filed by respondents, were equitable in nature and required the application of equitable principals in order to grant the basic relief prayed for by the respective parties." Id. 63

In making its determination that once having taken jurisdiction of a case for one purpose, equity will retain jurisdiction and finally dispose of litigation even though purely legal remedies are involved, the Court held that:

> "If it was the purpose and intent of petitioners to convert their cause of action from one in equity to one at law by the filing of their second amended complaint, their effort to do so was not made until after the case had been set for non-jury trial on the equitable issues

> raised by the first amended complaint and respondents' answer and counterclaim thereto. At that point it would have been improper for the trial court to have treated the case as one at law instead of one in equity." Id 64

The court's findings in Davis v. McGahee were based on a last minute amendment after the case had been set for a non-jury trial, and, therefore, the judicial findings therein have been erroneously applied by (a) the Defendants/Appellees, Vaughn Durham, et al. (see R 225-26) and (b) the Trial Court, since the same circumstances do not exist in the instant case.

Indeed, since the instant case had been set for a jury trial, and, presumably, the Trial Court would not have been able to even consider denying Plaintiff/-

Appellants, PCI, Sax and Horwitz's right to a jury trial had the other Counts of the Second Amended Counterclaim not been dismissed by the Trial Court's granting the Dismissal Motion, the circumstances of the instant case mandate, using the rationale of Davis v. McGahee, the impaneling of a jury by the Trial Court, since a last minute dismissal, after the case had been set for a jury trial, should not enable the Trial Court to treat the case as one at equity and not at law.

In addition, under Florida law, the Trial Court should have, as a result of its findings, awarded title to the Hotel to Plaintiff/Appellant, PCI since valid title could not have been vested in Defendants/Appellees, Vaughn Durham, et al. and, in turn, Carteret, if the deeds were delivered from escrow in violation

of the terms of the Escrow Agreement.

> "It is well settled that a deed delivered in violation of the conditions under which it is deposited in escrow vests no title in the grantee, or in even an innocent third person to whom he subsequently transfers." Bingham et al v. Taylor, 12 F.2d 15,16 (1926).

> "The law recognizes the right of a person to execute a deed and place it in escrow, to be delivered only upon the happening of certain contingencies and where such deed is obtained from the escrow holder by fraud or by theft, the grantor is no more liable to be deprived of his property by such wrongful act than he would if he had deposited the deed in an iron safe which had been broken into and the deed stolen." Houston v. Adams, 95 So. 859-860 (1923).

> "Even though a deed fraudulently procured from an escrow holder has been placed on record, and such record shows an apparent title in the one having possession of the land, in the absence of an estoppel upon the owner thereof, such recording does not effect the true title, and a mortgage executed by such person in possession to another who has no actual notice of the defect of title creates no lien upon such land, as against the holder of the actual legal title." Houston v. Forman, 109 So. 297 (1926).

The second case relied upon by the Trial Court, Phillips v. Kapus, 764 F.2d 807 (11th Cir. 1985) to deny Plaintiff/Appellants, PCI, Sax and Horwitz a jury trial, is also inapplicable and distinguishable.

In Phillips v. Kapus, plaintiff joint

venture partners sued defendant fellow venturers for traditional equitable relief, namely, rescission of a sale of their partnership interest, reformation of that partnership and a subsequent winding up and accounting of partnership affairs.

In that case the court held that:

> "(R)escissionary relief was available and was properly tried without a jury, notwithstanding that a previous tenant had exercised its option to buy the subject property; (and a) request for accounting was not tantamount to a legal claim for damages and was triable by the court."

In the instant case, in order for Defendants/Appellees, Vaughn Durham, et al. to seek rescission, the Plaintiff/-Appellants, PCI, Sax and Horwitz had to

be returned to the status quo ante, namely, title to the Hotel; and, it was not possible for Defendants/Appellees, Vaughn Durham, et al., either at the beginning of the first wave trial or after the Mid-Trial Settlement, to restore Plaintiff/Appellants, PCI, Sax and Horwitz to the status quo ante.

Indeed, since:

> "(r)escission is an equitable remedy that restores the parties to a transaction to their status quo ante...(t)his remedy is available, however, only against parties to a contract--a court may not order rescission in a buyer's action against a defrauding party who is not a party to the contract of sale....thus, in the context of Rule 10b-5, where buyers often sue parties that are not in privity of contract

> with the buyer, rescission is unavailable...." Ross v. Bank South, N.A., 885 F.2d 723 (11th Cir.1989).

the equitable remedy of rescission was never available, at the very least, as against Plaintiff/Appellants, Sax and Horwitz, who were, at all times during the first wave trial entitled to their constitutional right to trial by jury in this action for damages.

Additionally, as the court itself said in Phillips v. Kapus:

> "The seminal case of Beacon Theatres v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), and its progeny recognized that a jury trial predicated on a legal cause of action is not to be defeated or impaired by a prior proceeding without a jury on other issues involved in the same case. See also Eli Lilly

> Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1107 (5th Cir. 1972); Swofford v. B & W , Inc., 336 F.2d 406 (5th Cir. 1964), cert. denied, 379 U.S. 962, 85 Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961)."

Therefore, the court's findings in Phillips v. Kapus that:

> "plaintiff venturers did not seek return of ownership in the buildings on land which the partnership had purchased but merely sought restoration to their position as joint venturers and an accounting." Phillips, supra at 812-13

do not support the Trial Court's refusal to impanel a jury in the instant case and, in fact, mandate same, since the findings of the Trial Court have effectively defeated Plaintiff/Appellants, PCI, Sax and Horwitz's right to a jury

trial in subsequent waves of the Action.

Third, the Trial Court's observation that incidental damages were all that were demanded by Defendants/Appellees, Vaughn Durham in a "rescission" setting, is not the case since Defendants/Appellees, Vaughn Durham, et al.'s claims were not for damages incidental to rescission, but were, rather, for damages because rescission was not available.

Furthermore, even assuming, for the sake of argument, that rescission was possible on the first day of the first wave trial, as a result of the Mid-Trial Settlement, the Defendants/Appellees, Vaughn Durham, et al. were unable to return Plaintiff/Appellant, PCI to the status quo ante since the Hotel had been conveyed to Carteret and the Defendants/Appellees, Vaughn Durham, et

al. were only suing for "damages in lieu of rescission." See General Investment Company of Connecticut v. Ackerman, supra at page 40.

Therefore, the subsequent event of the Mid-Trial Settlement indisputably removed the counterclaims of Defendants/-Appellees, Vaughn Durham, et al. from a "rescission" setting, afforded Defendants/Appellees, Vaughn Durham, et al. a claim for monetary damages only, and clearly entitled Plaintiff/Appellants, PCI, Sax and Horwitz a trial by jury.

> "We cannot ignore the fact that these damages proceeded from events subsequent to the pleading and trial of the initial claim and that, of course, these damages are substantial. Accordingly, we hold that appellants were en-

> titled to seek a jury trial...." Adler v. Seligman of Florida, Inc., 492 So.2d. 730 (Fla. 4th DCA 1986).

Accordingly, rescission was unavailable to the Defendants/Appellees, Vaughn Durham, et al. at the commencement of the first wave trial and/or after the Mid-Trial Settlement, and:

The Trial Court failed to properly determine whether rescission was available to Defendants/Appellees, Vaughn Durham, et al. under of the Revised Second Amended Counterclaim either (a) at the beginning of the first wave trial or (b) after the Mid-Trial Settlement, since Plaintiff/-Appellant, PCI could not be returned to the status quo ante if rescission was granted by the Trial Court, in which event, the claims of the Defend ants/Appellees, Vaughn Durham, et al.

were, in fact, for monetary damages.

Additionally, the Bifurcation Order severed all of Plaintiff/Appellants, PCI, Sax and Horwitz's and Defendants/Appellees, Vaughn Durham, et al.'s claims against third parties for breach of contract, malpractice, fraud and monetary damages, including, without limitation, claims against professionals retained by Plaintiff/Appellants, PCI, Sax and Horwitz to render services which the Defendants/Appellees, Vaughn Durham, et al. relied upon in connection with their purchase of Units.

Clearly, a jury trial would have been available to Plaintiff/Appellants, PCI, Sax and Horwitz had the Action not been bifurcated, since the claims referenced in the immediately preceding paragraph are cognizable at law.

Therefore, Plaintiff/Appellants, PCI, and/or Sax and Horwitz were denied their right to trial by jury, since findings of the Trial Court in the Memorandum Opinion have effectively precluded and/or predetermined, without a jury trial, Plaintiff/Appellants, PCI, Sax and Horwitz's claims, crossclaims and counterclaims against all parties to the Action, as evidenced by the March 29, 1990 hearing before the Trial Court on Sparber's Summary Judgment Motions, where the Trial Court's findings were asserted by Sparber's counsel as collateral estoppel with respect to Plaintiff/Appellants, PCI, Sax and Horwitz's claims against Sparber.

Indicative of this conclusion is the Trial Court's entry of the Final Judgment in a bifurcated case where claims against parties to the first wave trial and

others were still pending.

> "Where issues bearing on count which was an allegedly equitable cause of action were virtually identical with those on the other counts, entire complaint should be tried in the same action and no prejudice would inure to defendants for jury trial issues would be determined in first instance to avoid any element of collateral estoppel arising with relation to jury counts." General Investment Company of Connecticut v. Ackerman, supra at 41.

As the court found in Chenery v.Crans, 497 So.2d 267 (Fla.2nd DCA 1986):

> "By bifurcating the case and trying the constructive trust claim first and ultimately ruling on all claims, the trial court denied appellants of their right

> to jury trial on their damages claim. Even if the trial court had only ruled on the constructive trust claim, appellants still would have been denied their right to a jury trial on the damages claim because the issues in both claims were so related that the trial court's initial findings of fact on the constructive trust claim would necessarily bind the jury when it later heard the damages claim." Id. at 269.

In addition the case law is clear that:

> "where both legal and equitable issues are presented in a single case 'only under the most imperative circumstances ... can the right to a jury trial of legal issues be lost through prior determination of equitable claims." Cerrito, supra, at 1022; and,

"A mixture of legal and equitable claims in the same case cannot deprive a party of a timely requested jury trial on the legal issues." Smith v. Orange County, 497 So.2d 985,986 (Fla. 5th DCA 1986); and,

"where the compulsory counter-claim entitles the counter-claimant... to a jury trial on issues which are sufficiently similar or related to the issues made by the equitable claim that a determination by the first fact finder would necessarily bind the later one, such issues may not be tried nonjury since to do so would deprive the counter-claimant of his constitutional right to a jury trial." Adams, supra, at 685; and,

"Where both equitable and legal claims arise in the same case, this cannot

> serve to deprive either party of the right to a jury trial of issues traditionally triable by jury. Padgett v. First Federal Savings & Loan Association, 378 So.2d 58 (Fla. 1st DCA 1979), and cases cited. We hold that ... the issues involved in the complaint and counterclaim are so intertwined that a jury trial should be afforded on all issues. Napolitano v. H.L. Robertson and Associates, Inc., 311 So.2d 757 (Fla. 3d DCA 1975); Adams v. Citizens Bank of Brevard, 248 So.2d 682 (Fla. 4th DCA 1971)." Construction Systems, Etc. v. Jennings Const., 413 So.2d 1236, 37 (Fla. 3rd DCA 1982). See also Hightower v. Bigoney, 156 So.2d 501 (Fla.1963).

Accordingly, since the "(r)ight to a jury trial is not a discretionary matter with (the) judge," Boston Rug Galleries,

Inc. v. William Iselin & Co., 212 So.2d 58 (Fla. 4th DCA 1968), and a jury trial should have been available under the Amended Complaint for Plaintiff/Appellants, PCI, Sax and Horwitz's claims, cross claims and counterclaims against Sparber, Cohen and PKF among others:

The Trial Court failed to properly consider the effect of its Bifurcation Order since Plaintiff/Appellants, PCI, Sax and Horwitz are entitled to a jury trial if matters triable by a jury, namely, their claims against Sparber, Cohen, PKF, and others were precluded by a non-jury trial.

In conclusion, Plaintiff/Appellants, PCI, and/or Sax and Horwitz, for all of the reasons set forth above, both pre-trial, as a result of various orders of the Trial Court; during the Pre-Trial

Conference, as a result of the dismissal of certain of the counterclaims; at the beginning of the first wave trial, as a result of the pending damage, fraud and note claims where rescission was unavailable; and, after the Mid-Trial Settlement, as a result of the Trial Court's unequivocal inability to grant "rescission," were denied their fundamental right to trial by jury, (See State Dept. of Natural Resources v. Estech, Inc., 515 So.2d 758 (Fla.2nd DCA 1987)), although the law clearly provides that:

> "Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions. See U.S. Constitution,

Amendments 7 and 14, and Florida Constitution, Article I, Declaration of Rights, § 22." Hollywood, Inc. v. City of Hollywood, 321 So.2d. 65,71 (Fla.1975);

and,

"The constitutional right to a trial by jury is not to be narrowly construed. See Hollywood, Inc. v. City of Hollywood, 321 So.2d 65 (Fla. 1975). This right is not limited strictly to those specific proceedings in which it existed before the adoption of our constitution, but should be extended to proceedings of like nature as they may arise. Wiggins v. Williams, 36 Fla. 637, 18 So. 859 (1896). Accord, People v. One 1941 Chevrolet Coupe, 37 Cal.2d. 283, 231 P.2d 832 (1951); State v. 1920 Studebaker, 120 Or. 254, 251 P. 701 (1926); Colon v.

Lisk, 13 A.D. 195, 43 N.Y.S. 364, affd, 153 N.Y. 188, 47 N.E. 302 (1897).

"In Wiggins v. Williams this Court stated:

'(W)hen the right of trial by jury is secured by constitutional provision in general terms like ours, and without any qualification or restriction, it must be understood as re tained in all of those cases that were triable by jury according to the course of the common law.... The authorities, with great uniformity hold that constitutional provisions like ours were designed to preserve and guaranty the right of trial by jury in proceedings according to the course of the common law as known and practiced at the time of adoption of the Constitution .... [and] it is the nature of the contro-

versy between the parties and its fitness to be tried by a jury according to the rules of the common law, that must decide the question.' [quoting Plimpton v. Town of Somerset, 33 Vt. 283 (1860)], 36 Fla. at 650-51, 653, 18 So. at 863-64." In Re Forfeiture of 1978 Chevrolet Van, 493 So.2d 433 (Fla. 1986).

"(T)he denial of the right to jury trial is more than the denial of a constitutional right; it is the denial of a fundamental right recognized prior to the adoption of a written constitution. The right to select the peers to which one's cause will be submitted is unique and indispensable to the adversary system." Spring supra, at 47..

Point Two

The Trial Court Erred in Denying to

Plaintiff/Appellants, PCI, Sax and Horwitz Judicial Enforcement of a Contract.

Plaintiff/Appellants, PCI, Sax and Horwitz were denied judicial enforcement of their contract with Defendants/Appellees, Vaughn Durham, et al., since the Trial Court ignored the effect of the Transfer Letters.

In addition to the numerous standard securities disclaimers set forth in the PPM (R 3219-3337), the PPM included:

> "ANY REPRESENTATION MADE WHICH IS NOT CONTAINED IN OR IS BEYOND THE STATEMENTS MADE IN THIS MEMORANDUM IS MADE WITHOUT ANY AUTHORITY FROM PCI AND MUST BE IGNORED." (R 3222)

and,

> "FORECASTED OPERATING RESULTS ARE IMPOSSIBLE TO ACCURATELY PREDICT AND NO REPRESENTATION

> OF ANY KIND IS MADE WITH RESPECT TO THE ACCURACY OF THE ASSUMPTIONS IN THE PROJECTIONS." (R 3223)

In addition, the PPM included, inter alia, a purchase agreement (the "Purchase Agreement") (R 3351-55), which provided that:

> "Seller reserves the right to make any modifications or amendments to the Declaration furnished to Purchasers (including Exhibits thereto) prior to the closing of title; provided, however, that no such modifications or amendments shall materially or adversely affect the Purchaser, his Unit or the value of his investment in the Hotel, and Seller's Florida Counsel shall render an opinion to Purchaser to such effect. Upon making any modifications, Seller shall notify Purchaser thereof and

> furnish Purchaser a complete copy of all such modifications;" (R 3354)

and,

> "Purchaser acknowledges that he has not relied on any representations, warranties, statements or estimates of any nature whatsoever, whether written or oral, made by Seller, or otherwise, except as provided herein or in the Offering Materials." (R 3354)

Furthermore, the PPM included a rental management agreement (the "Rental Management Agreement) (R 3356-65), which provided, in pertinent part, that:

> "Unit Owner hereby appoints and designates Hotel Agent as Unit Owner's sole and exclusive agent to manage, supervise, operate and rent the Unit.... Unit Owner hereby grants to Hotel Agent complete

> control and authority in the operation, direction, management and supervision of the Unit." (R 3357)

Since the Transfer Letters were executed by PV, as agent for the Defendants/Appellees, Vaughn Durham, et al. under the Rental Management Agreement, Plaintiff/-Appellants, PCI, Sax and Horwitz were entitled to judicial enforcement of its terms, since the Transfer Letters obviate the Trial Court's findings of omissions and misrepresentations in the Memorandum Opinion.

The Transfer Letters, in particular, provided that:

(a) Agent of Unit Owners: "...as Hotel Agent...under paragraph 2 'Hotel Agent Authority and Duties'...it being the understanding that all of the following undertakings are made by you as

agents of the Unit Owners..." (R 3076)

(b) Insurance: "You agree to assume the insurance policies set forth on Exhibit A attached hereto." (R 3076) (See also R 3079-80)

(c) Working Capital Loans: "You agree to cooperate and assist...Palm Court, Inc....(to)... arrange loans and lines of credit secured by future distributions of Unit Owners' Operating Cash Flow, and to repay Palm Court, Inc. the $84,000 advanced by Palm Court, Inc. in excess of the amount supposed to be advanced by Palm Court, Inc. for (a) non-consumable supplies, (b) start-up expenses and (c) working capital, all in accordance with the Confidential Private Placement Memorandum of the Palm Court as more particularly set forth on Additional Memorandum dated December 17, 1985 and attached

hereto as Exhibit B...." (R 3076-77 R 3081-91) "(Y)ou have advised us that you may, without our assistance, find it difficult to arrange for such line of credit...(t)herefore, we (PCI) have agreed...to assist you in arranging such line of credit...in the amount of $200,000...(and) we have agreed, until such time as the line of credit is put in place, to advance funds to the Hotel as if the line of credit had been in place under terms and conditions similar to those that may be obtained by a third party lender...."

(d) Advertising and Public Relations: "You agree to assume the advertising and public relations agreement with Spector/Anker Associates, together with any monthly invoices therefor..." (R 3077)

If the Trial Court had given judicial effect to the Transfer Letters, the Trial Court would have found that Plaintiff/-Appellants, PCI, Sax and Horwitz complied with the following Closing Requirements set forth in the Escrow Agreement:

(a) Certificate of Occupancy: "The Seller has obtained a Certificate of Occupancy for the Hotel...." (R 3059)

(b) Arcitect's Certificate of Substantial Completion: "An Architect's Certificate certifying substantial completion of the renovation has been executed and delivered." (R 3059)

(c) Hotel Agent Certification: "The Hotel Agent has certified to the Seller that the Hotel has been fully furnished and is ready for occupancy and operation as a European-style luxury resort hotel and that the Hotel Agent is prepared to

commence operation of the Hotel under the Rental Management Agreements,...." (R 3069)

(d) Insurance: "The insurance described in the Memorandum ...has been obtained...." (R 3060);

In addition, the Trial Court would not have been able to find the following material misrepresentations:

(a) $75,000 Hotel Working Capital Fund: Since same was specifically off set by the Transfer Letter (see R 3076 and 3087 and 3147) and $80,000 was actually advanced by Plaintiff/Appellant, PCI in excess of the original $75,000, under the $200,000 line of credit agreement.

(b) Certificate of Occupancy: Since same was reviewed and accepted by the Hotel Agent, at the Closing, as agent for Defendants/Appellees, Vaughn Durham, et

al.

(c) Insurance: Since the certificate for same was attached to the Transafer Letters, and the requirement to obtain insurance was an obligation of the Hotel Agent under both the PPM and the Rental Management Agreement. (R 3358, 3364);

Furthermore, the Trial Court would not have been able to find the following material omission:

The Hotel Missed the 1986 Season: Since the Hotel Agent attended the Closing, was charged with pre-opening management such as pre-bookings, and inspected the Hotel the morning of the Closing and certified that the Hotel was substantially complete and ready for business.

Accordingly, the Trial Court, would only have been able to find material misrepresentations and omissions in two

(2) categories, namely, those involving (a) Sparber and (b) PV, as follows:

(a) Sparber : (1) That $300,000 would be used for advertising, and (2) that the Hotel was a non-conforming use and structure; and,

(b) PV: (1) That the restaurant upgrading would have a negative impact on the projections, (2) that Chef Surmain's independent status would have a negative impact on the projections, (3) that Plaintiff/Appellant, PCI had lost confidence in PV and that PV would have to be replaced, (4) that PV questioned the projections and (5) that Plaintiff/Appellants, Sax and Horwitz were suing a principal of PV for fraud.

Since the Purchase Agreements and the Rental Management Agreements were executed and delivered on or before the Clos-

ing, Plaintiff/Appellants, PCI, Sax and Horwitz were entitled to rely upon PV's agency and authority in executing the Transfer Letters on behalf of Defendants/Appellees, Vaughn Durham, et al.

First, all of the alleged remaining material omissions and misrepresentations were fully known to PV at or prior to the Closing.

Second, the Defendants/Appellees, Vaughn Durham, et al. purchased the Units with full knowledge that "operating results are impossible to accurately predict," and PV, as agent, had full knowledge of any alleged inconsistencies in the Forecasts.

Third, Plaintiff/Appellant, PCI reserved the right to make modifications and amendments which did not materially

or adversely affect the value of the Unit, and PV, as agent, agreed, at the Closing, to the closing adjustments either set forth in the Transfer Letters or discussed with PV at the Closing.

Accordingly, the Trial Court, erred in not giving judicial effect to the Transfer Letters, and, in turn, the Rental Management Agreement, the Purchase Agreement, and the PPM, all of which were a judicially enforceable contract, the terms of which if given proper enforceability, would have obviated the findings in the Memorandum Opinion.

At the very least, the Trial Court should have recognized that the Transfer Letters proved that Plaintiff/Appellants, PCI, Sax and Horwitz did not intend to defraud Defendants/Appellees, Vaughn Durham, et al., thereby avoiding any

finding of intentional wrongdoing.

It should strain the credulity of this Court that PV, as agent of Defendants/Appellees, Vaughn Durham, et al. was authorized to make the Facade Easement Donation, but was not, simultaneously, authorized to execute and deliver the Transfer Letters.

Accordingly, since, as stated by the Supreme Court in David v. Sun Federal Savings & Loan, 461 So.2d 93 (Fla.1984):

> "Safeuarding the validity of such contracts (a mortgagee's contractural right to acceleration), and assuring the right of enforcement thereof, is an obligation of the courts which has constitutional dimensions...See also Art. I, §10, U.S. Const.; Declaration of Rights Art. I, §10, Fla. Const.,"

the Trial Court did not properly consider the effect of the Transfer Letters, and:

The Trial Court erred in denying Plaintiff/Appellants, PCI, Sax and Horwitz's right to judicial enforcement of a contract.

CONCLUSION

The Memorandum Opinion and the Final Judgment of the Circuit Court, as to Counts III, IV and V of the Revised Second Amended Counterclaim of Defendants/Appellees, Vaughn Durham, et al. should be reversed and the Action should be remanded to the Trial Court for a jury trial.

Lanny A. Horwitz, Esq.
P.O. Box 5684
Hilton Head Island, SC 29938
(803) 785 5650
Florida Bar No. 142489

Carl A. Sax, Esq.
6015 N. Ocean Boulevard
Ocean Ridge, FL 33435
(407) 737 9951
Florida Bar No. 202266

Attorneys for Plaintiff/Appellants,
Palm Court, Inc., Carl A. Sax and
Lanny A. Horwitz

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this ____ day of April, 1990 to Michael A. Hanzman, Esq., Floyd Pearson Richman Greer Weil Zack & Brumbaugh, P.A., Attorneys for Defendants/Appellees, Vaughn Durham et al., Courthouse Center, 26th Floor, 175 N.W. First Avenue, Miami, FL 33128-1817.

Lanny A. Horwitz, Esq.
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Hilton Head Island, SC 29938
(803) 785 5650
Florida Bar No. 142489

Carl A. Sax, Esq.
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Ocean Ridge, FL 33435
(407) 737 9951
Florida Bar No. 202266

IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

PALM COURT, INC., et al.,

Appellants,

v. CASE NO. 88-1203

VAUGHN DURHAM, et al.,

Appellees.

APPENDIX TO INITIAL BRIEF

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Lanny A. Horwitz, Esq.
P.O. Box 5684
Hilton Head Island, SC 29938
(803) 785 5650
Florida Bar No. 142489

Carl A. Sax, Esq.
6015 N. Ocean Boulevard
Ocean Ridge, FL 33435
(407) 737 9951
Florida Bar No. 202266

Attorneys for Plaintiff/Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz

COHEN, SCHERER AND COHN, P.A.
ATTORNEYS AT LAW
5455 NORTH FEDERAL HIGHWAY
PYLON PLAZA NO. 2 SUITE E
BOCA RATON, FLORIDA 33431

December 30, 1985

PV Hotels Corporation
135 West Central Boulevard
Orlando, Florida 32801

Re: Rental Management Agreements for the Palm Court (a Hotel/Condominium) Palm Beach, Florida (the "Agreements")

Gentlemen:

In connection with the delivery and execution of the Agreements this date, you agree, as Hotel Agent, as soon as practicable, but in any event, not later than January 10, 1986, under paragraph 2 "Hotel Agent's Authority and Duties" and paragraph 10 regarding "Furniture, Furnishings, Fixtures and Equipment" as follows, it being the understanding that all of the following undertakings are made by you as agents of the Unit Owners

with no personal liability as to any contracts or other items being assumed.

1. Utility Contracts. You agree to transfer to the account of The Palm Court from the account of Palm Court, Inc. any and all utility contracts and to assume any outstanding amounts due therefor.

2. Insurance. You agree to assume the insurance policies set forth on Exhibit A attached hereto.

3. Working Capital Loans. You agree to cooperate with and assist wherever possible Palm Court, Inc. and its principal officers arrange loans and lines of credit secured by future distributions of Unit Owners' Operating Cash Flow, as to repay Palm Court, Inc. the $84,000.00 advanced by Palm Court, Inc. in excess of the amount supposed to be advanced by

Palm Court, Inc. for (a) non-consumable supplies, (b) start-up expenses and (c) working capital, all in accordance with the Confidential Private Placement Memorandum of the Palm Court as more particularly set forth on Additional Memorandum dated December 17, 1985 and attached hereto as Exhibit B, from the first proceeds available from such loans or lines of credit, or from the first distributions payable under that certain $938,250.00 Revolving Credit Facility provided by Palm Court, Inc. It being understood that PV Hotels Corporation shall not be personally liable for the repayment of the above sum to Palm Court, Inc.

4. Bank Accounts. You agree to maintain bank accounts of The Palm Court at First

American Bank and Trust of Palm Beach and/or at the request of Palm Court, Inc. to transfer such accounts to Bank Leumi Trust Company of New York.

5. Condominium Owners Association. You agree to schedule the first meeting of the condominium owners association in accordance with the terms of the Declaration of Condominium of The Palm Court.

6. Furniture, Fixtures and Equipment. You agree to assume, for the account of The Palm Court, together with any monthly rental payments due thereunder, the equipment leases relating to (a) the telephone system, (b) the televisions, (c) the Rolls Royces, (d) the bake shop, (e) the computer system and (f) the back-office furniture, all as more particularly set forth on Exhibit C attached here-

to.

7. Advertising and Public Relations. You agree to assume the advertising and public relations agreement with Spector, Anker Associates, together with any monthly invoices therefor, if any; and to honor the charitable donations to the Jewish Community Center (two free dinners for two, including Rolls Royce pickup) and the Boca Raton Arts Center (one free dinner for two).

Further, you acknowledge receipt of a copy of that certain addendum to the Confidential Private Placement Memorandum of The Palm Court dated October 15, 1985 and agree that same shall govern if in conflict with the terms of the Agreement.

Finally, the terms and conditions of this letter shall be legally binding upon PV

Hotels Corporation pending the execution of more formal documentation in connection with the above-referenced items. Your signature below shall evidence your complete understanding of and agreement with the contents of this letter.

Very truly yours,

Andrew M. Jacobson

AMJ/jsl

Attachments

The foregoing is approved and accepted this 30 th day of December, 1985

PV Hotels Corporation

By: Lewis Hautzig, V.P.

To: Louis Hautzig

From: Bill Elliott

Date: December 27, 1985

Re: the Palm Court

Under the Confidential Private Placement Memorandum, Palm Court, Inc. agreed to provide certain funds for the hotel as follows:

1. Non-consumable Supplies	$125,000.00
2. Start Up Expenses	165,500.00
3. Hotel Working Capital	75,000.00
Total	$365,500.00

Not withstanding the foregoing, Palm Court, Inc. has provided funds for the hotel as follows:

1. Non-consumable Supplies	$134,268.97
2. Start Up Expenses	209,340.47
3. Hotel Working Capital	105, 813.37
Total	$449,422.81

In support of the foregoing, I have

enclosed a computer schedule together with the supporting documentation for your review.

In order for you, as Hotel Agent, to meet current operating expenses, I suggest you immediately finalize the loans provided for under the various management agreements.

Remember, such loans are to be secured by an assignment of Unit Owners' Hotel Cash Flow.

If you require any assistance or if you have any questions, please call.

PS, The additional $84,000 that we advanced should be returned to us from loan proceeds.

PALM COURT, INC.
PARTIAL ANALYSIS OF USE OF SALES PROCEEDS

START UP EXPENSES:	ACTUAL EXPENDITURES
PUBLIC RELATIONS	33,770.04
BROCHURE	18,551.42
VIDEO PRESENTATION	6,776.63
GRAND OPENING PARTY	39,948.31
ANDRE SURMAIN EXPENSES	12,361.96
TRAVEL	13,022.68
PALM COURT HOTEL STAFF PAYROLL	67,143.44
PALM COURT HOTEL OFFICE STAFF EXPENSES	17,765.99
TOTAL	209,340.47

HOTEL WORKING CAPITAL	ACTUAL EXPENDITURES
PROPERTY INSURANCE DEPOSITS	11,530.00
ADVERTISING AND MARKETING	16,306.45
HOTEL AND OFFICE SUPPLIES	1,648.01
CONSUMABLE SUPPLIES	24,119.46
LEASE DEPOSITS	15,005.90
ANDRE SURMAIN PAYROLL	25,000.02
PALM COURT HOTEL STAFF PAYROLL AFTER DEC 18	9,353.53
PREPAID PARKING EXPENSE	2,850.00
TOTAL	105,813.37

NON-CONSUMABLE SUPPLIES	ACTUAL & UNPD EXPENDITURES
LEONARD PARKER COMPANY	47,441.62
CHINA AND ACCESSORIES	75,947.68
UNIFORMS	10, 879.67
TOTAL	134,268.97
GRAND TOTAL	449,422.81

PALM COURT, INC.
c/o Cohen, Scherer & Cohn, P.A.
5455 North Federal Highway
Suite E
Boca Raton, Florida 33431
(305) 994-6677

December 31, 1985

PV Hotels Corporation
135 West Central Boulevard
Orlando, Florida 32801

Attention: Robert Von Bereghy

Re: The Palm Court

Gentlemen:

In Connection with the closing of the sale of the hotel/condominium units, we have requested that you establish a line of credit on behalf of the Unit Owners in order to provide working capital for the operation of the hotel until funds may be drawn down under that certain $938,250.00 Letter of Credit.

Although the Rental Management Agreements specifically authorize you to establish such line of credit on behalf of the Unit Owners and to secure such Line of Credit by an assignment of Unit Owners Hotel Cash Flow, you have advised us that you may, without our assistance, find it difficult to expeditiously arrange for such line of credit until such time as the hotel has been in operation and generated sufficient income from operations to assure the line of credit Lender with appropriate means of repayment.

Therefore, we have agreed, and do hereby agree, to assist you in arranging such line of credit for and on behalf of the Unit Owners.

In connection therewith, we have agreed that such line of credit shall be in the

amount of $200,000.00 and shall be repayable under terms and conditions and interest rate to be negotiated at a later date.

Since the new year is upon us, you have further expressed your concern that income from operations on an immediate weekly basis may be insufficient to meet payroll and other operating expenses.

Therefore, we have agreed, until such time as the line of credit is put in place, to advance funds to the hotel as if the line of credit had been put in place under terms and conditions similar to those that may be obtained by a third party lender.

In connection therewith, we shall deliver to you immediately after the First necessary documentation to evidence the line

of credit, with the security being the assignment of the Unit Owners Hotel Cash Flow, and the understanding that these said documents will serve as the model for the documents to be provided by the third party lender.

I trust that this sets your mind at ease, and that you will be able to get down to the real business at hand.

Very truly yours,
Palm Court, Inc.
By: CARL A. SAX, President
By:LANNY A. HORWITZ, Vice President

CAS/jsl

EXHIBIT B

EXHIBIT B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

PALM COURT, INC., et al.,

Appellant(s),

v. CASE NO. 88-1203

VAUGHN DURHAM, et al.,

Appellee(s).

June 4, 1990

BY ORDER OF THE COURT:

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

ORDERED that the Appellees' March 16, 1990 renewed motion to dismiss appeal is granted and the above-styled appeal is dismissed.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK.

cc: Sally R. Doerner
Lanny A. Horwitz
Hon. John B. Dunkle, Clerk (86-3885 CLF & 86-9123 CEF)
cms

EXHIBIT C

EXHIBIT C

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

vs.

VAUGHN DURHAM, et al.,

Appellees.
_____/

RENEWED MOTION TO DISMISS APPEAL

Appellees Vaughn Durham, et al., through counsel, renew their motion to dismiss this appeal for the appellants' continued failure to provide a transcript of trial and state:

1. This is a plenary appeal from a final judgment adjudicating the appellants guilty of fraud and securities violations in connection with a securi-

ties offering they sponsored. The appellants noticed this appeal almost two years ago, on May 2, 1988.

2. On August 30, 1988, this court issued an order to show cause directing the appellants to explain why their appeal should not be dismissed for their failure to submit directions to the clerk or a designation to the reporter. Accordingly, the appellants filed both pleadings on September 2, 1988.

3. In an order dated October 17, 1988, this court granted the court reporter an extension of time of "ninety (90) days ONLY from the date of this order" to prepare the transcript of proceedings. The transcript accordingly was due to be filed by January 15, 1989.

4. On June 8, 1989, the appellees moved

to dismiss this appeal on the ground that the appellants still had failed to provide a transcript of trial. [Exhibit A]. The appellee's motion was denied in an order dated September 18, 1989, which specifically directed that

> appellant shall have a period of seventy-five (75) days within which to obtain a transcript of the trial testimony from the court reporter, said period of time to commence as soon as the trial judge enters an order disposing of the current garnishment proceedings against the court reporter involved here. [Exhibit B]

5. On November 13, 1989, the appellees supplemented the record on this appeal with the lower court's final judgment for garnishment, which was entered November 10, 1989. [Exhibit C].

Pursuant to the terms of this court's September 18 order, then, the trial transcript was due to be filed no later than January 24, 1990. As no transcript has yet been filed, the transcript thus is now almost three months overdue once again.

6. In November, 1989, the parties entered into a Stipulation of Settlement regarding the various matters pending between them. [Exhibit D]. That settlement provided specifically that "nothing contained herein shall prohibit [the appellants] from continuing the Appeal ... with respect to Counts III, IV and V of the Revised Second Amended Counterclaim." Nothing in that agreement excused the appellants from their responsibility to provide a transcript of trial

for appellate purposes as to those remaining counts 9i.e., various violations of the Securities Act of 1933).

7. Appellant Lanny Horwitz's present maneuvering to be declared indigent by the lower court should have no effect on this court's willingness to dismiss this appeal. The transcript was due, even after this court's repeated indulgences, almost three months ago, long before the motions claiming indigence were filed. The appellees, all of whom are investors victimized by the fraud of Mr. Horwitz and his partner, to date have been denied any recompense whatever for their losses. This delay, now nearly two years in length, has been occasioned entirely by the appellants' recalcitrance and failure to abide by the applicable appellate rules. To require the appellees to wait

longer would be unconscionable.

WHEREFORE, the appellants renew their request that this appeal be dismissed as a sanction for the appellants' repeated failures to provide a transcript of the trial.

FLOYD PEARSON RICHMAN
GREER WEIL ZACK & BRUM-
BAUGH, P.A.
Attorneys for Appellees
CourtHouse Center, 26th
Floor
175 N.W. First Avenue
Miami, Florida 33128-1817
Telephone: (305) 373-4000

By: MICHAEL A. HANZMAN

By: SALLY R. DOERNER
Fla. Bar No. 251194

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT
CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

vs.

VAUGHN DURHAM, et al.,

Appellee.
_____/

MOTION TO DISMISS APPEAL

Appellees Vaughn Durham, et al., through counsel, move the court pursuant to Florida Rule of Appellate Procedure 9.200 to dismiss this appeal for the appellants' failure to prepare and file a transcript of the trial, and a grounds state:

1. This is a plenary appeal from a final judgment adjudicating the appellants guilty of fraud and securities violations in connection with a securi-

ties offering they sponsored. The appellants noticed this appeal on May 2, 1988.

2. On August 30, 1988, this court issued an order to show cause directing the appellants to explain why this appeal should not be dismissed for their failure to submit directions to the clerk or a designation to the reporter. Accordingly, the appellants filed both pleadings on September 2, 1988.

3. In an order dated October 17, 1988, this court granted the court reporter an extension of time of "ninety (90) days ONLY from the date of this order" to prepare the transcript of proceedings for this appeal. The transcript accordingly was due to be filed by January 15, 1989.

4. On January 20, 1989, this court

granted the parties' joint motion for a relinquishment of jurisdiction to the lower court for the purpose of effectuating a settlement of this cause. That order specified that "the Court Reporter shall hold in abeyance completion of appellate transcripts pending completion of proceedings to effectuate settlement."

5. In an order dated March 15, 1989, this court granted the appellants' motion for an extension of the period of relinquishment to and including March 30, 1989.

6. On March 3, 1989, the lower court issued an order declining to ratify the parties' settlement proposal. That order is the subject of a separate, non-final appeal presently pending before this court as case number 89-00939.

7. On April 3, 1989, the appellants

moved to extend the period of abatement of this proceeding pending the outcome of the non-final settlement appeal. Specifically, the appellants asked to be relieved of their obligation to prepare and to submit the trial transcript in this appeal until the non-final appeal is concluded. This court denied the appellants' motion in an order dated May 9, 1989.

8. At present, thirteen months have passed since this appeal was noticed. A full month has passed since this court denied the appellants' attempt to abate their responsibility immediately to file the trial transcript, so there is no doubt that the transcript is now long overdue. To date, however, the trial transcript has not been submitted.

9. Undersigned counsel for the

appellees telephoned the court reporter this morning and was informed that only a very small portion of this five - week trial has been transcribed to date. The reporter estimated that approximately 5000 pages have yet to be transcribed.

10. The appellees respectfully suggest that the appellants' inordinate and unauthorized delay in preparing and submitting the trial transcript in this action constitutes an abuse of the appellate process. It has become increasingly clear, particularly in light of the appellants' failure to supersede the judgment at bar and their repeated attemts to delay this proceeding by any and all possible means, that they have no real intention of pursuing this appeal to a conclusion on its merits. It is patently unfair under such circumstances to

require the appellees further to await the final resolution of this controversy.

Wherefore, the appellees respectfully move this court to dismiss this appeal for the appellants' failure to provide a transcript of the trial.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 8th day of June, 1989 to: Robert L. Bogen, Esquire, Braverman & Bogen, 639 E. Ocean Avenue, Suite 209, Boynton Beach, Florida 33435.

FLOYD PEARSON RICHMAN
GREER WEIL ZACK & BRUMBAUGH, P.A.
CourtHouse Center, 26th Floor
175 N.W. First Avenue
Miami, Florida 33128-1817
Telephone: (305) 373-4000

By: MICHAEL A. HANZMAN
SALLY R. DOERNER

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

PALM COURT, INC., et al.,

Appellant(s),

v. CASE NO. 88-1203

VAUGHN DURHAM, et al.,

Appellee(s).

September 18, 1989

BY ORDER OF THE COURT:

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

ORDERED that the Appellees' motion to dismiss the plenary appeal in Case No. 88-1203 and appellant's motion to abate garnishment proceedings are denied.

IT IS FURTHER ORDERED that appellant shall have a period of seventy-five (75) days within which to obtain a transcript of the trial restimony from the court reporter, said period of time to commence as soon as the trial judge enters an

Exhibit B

order disposing of the current garnishment proceedings against the court reporter involved here.

I hereby certify the foregoing is a
true copy of the original court order.

CLYDE L. HEATH,
CLERK.

cc: Robert L. Bogen, Esq.
Michael A. Hanzman, Esq.
cms

IN THE CORCUIT COURT OF
THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA
CIVIL DIVISION
CASE NO. 86-3885 (CL) F

PALM COURT, INC..,
et al.,

Plaintiffs/Counter-
Defendants,

vs. FINAL JUDGMENT
FOR GARNISHMENT

VAUGHN DURHAM, et al.,

Defendants/Counter-
Claimants,

and

MUDRICK, WITT & LEVY,

Garnishee.
_____/

THIS CAUSE came before the court for trial without a jury upon the Defendants/Counterclaimants' Motion for Garnishment After Judgment and the Third Party Claim of the law firm of Braverman and Bogen, and the court having heard and

Exhibit C

considered evidence and testimony and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is hereby granted and entered in favor of the Defendants/Counterclaimants who shall recover from the Garnishee, MUDRICK, WITT & LEVY, the sum of $5,000, for which let execution issue.

2. The Third Party Claim of the law firm of Braverman and Bogen is determined to be without merit and is hereby denied.

3. The findings of fact and conclusions of law announced by the court at the final hearing on October 24, 1989 are incorporated and adopted here by reference in their entirety.

4. Jurisdiction is hereby reserved

for the taxation of costs in accordance with the applicable statutory provisions.

DONE and ORDERED in chambers at Palm Beach County, Florida on this ___ day of _____, 1989.

SIGNED AND DATED
NOVEMBER 19, 1989
JUDGE DANIEL T. K.
HURLEY
CIRCUIT COURT JUDGE

Copies furnished to:

Robert Bogen, Esquire
Michael Hanzman, Esquire
Thomas Bratton, Esquire

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 86 3885 CL F

IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA, FOURTH DISTRICT

CASE NO. 88 1203

PALM COURT, INC.,

Plaintiff,

vs.

VAUGHN DURHAM, et al.,

Defendants.

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is being made and executed as of this ___ day of November, 1989, by and between the Unit Owners whose names appear on Exhibit "A" attached hereto (the "Unit Owners"),

Palm Court, Inc., a Florida corporation ("PCI"), Carl A. Sax ("Sax") and Lanny A. Horwitz ("Horwitz"), and their respective counsel.

WHEREAS, the Unit Owners, PCI, Sax and Horwitz are currently involved in litigation pending in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, styled Palm Court, Inc. v. Vaughn Durham, et al.m Case No. 86-3885, (CL) F, as well as in matters pending in other jurisdictions, each of which relate to the offering of hotel interests in the Palm Court Hotel; and

WHEREAS, on March 28, 1988 the Trial Court entered a Memorandum Opinion and Final Judgment in the case of Palm Court, Inc. v. Vaughn Durham, et al., in which the Court made certain findings of fact and conclusions of law favorable to

certain of the Unit Owners and adverse to PCI, Sax and Horwitz (the "Final Judgment" and the "Memorandum Opinion"); and

WHEREAS, on May 2, 1988, the Trial Court entered an Order granting a Motion for Final Summary Judgment in favor of those Unit Owners who were not parties to the Final Judgment (the "Final Summary Judgment"); and

WHEREAS, PCI, Sax and Horwitz have filed a Notice of Appeal from the Final Judgment and the Final Summary Judgment (collectively, the "Appeal"); and

WHEREAS, the parties realize that litigation between them is extremely complex, vexatious and costly, and that there are inherent risks to all parties should the case proceed further; and

WHEREAS, the parties, without in any way conceding to the merits of each

others position, seek to avoid the risk of further litigation through a settlement of this matter consistent with a fair resolution of the issues; and

WHEREAS, Sax and Horwitz are majority stockholders of PCI with full and complete authority to authorize and/or execute this Stipulation on behalf of PCI;

IT IS HEREBY AGREED AND UNDERSTOOD, as follows;

1. The above representations and recitals arc true and accurate and have induced the parties into executing this Stipulation.

2. As part and parcel to a settlement of this matter, the respective parties represent, agree and/or undertake to do the following:

(a) As to PCI, it is stipulated

that:

(i) PCI will not appeal any aspect of the Final Judgment or Memorandum Opinion with respect to Counts I and II of the Revised Second Amended Counterclaim, but nothing contained herein shall prohibit PCI from continuing the Appeal, except as aforesaid, in order to reverse the Judgment or Memorandum Opinion with respect to Counts III, IV and V of the Revised Second Amended Counterclaim. Upon execution of this Agreement, PCI shall file a dismissal of its appeal to the extent it seeks any relief pertaining to Counts I and II and a notice of intent to continue its Appeal only to the extent it seeks relief from Counts III, IV and V of the Revised Second Amended Counterclaim and those aspects of the Final Judgment or Memorandum Opinion which

pertain thereto;

(ii) PCI agrees that the amounts awarded to the Unit Owners under Paragraph 5 of the Final Judgment shall be final, enforceable, not subject to appeal, rehearing, collateral attack or further review, subject to execution in accordance with Florida Statutes and non-dischargeable in the event that PCI should seek protection from creditors under any Federal or State Debtor Relief Statute;

(iii) The Unit Owners agree that execution and discovery and proceedings in aid of execution on the Final Judgment shall be withheld pending final resolution of this matter, as to all waves and all other parties, inclusive of all appeals;

(iv) As to the Final Summary Judg-

ment, all of the foregoing Stipulations as to the Final Judgment, specified in subparagraphs (i) through (iii) above, shall apply to the Final Summary Judgment, that a final judgment pertaining to the Final Summary Judgment, as aforesaid shall be entered by the Trial Court forthwith, and that the amount of the final judgment in favor of those Unit Owners who were not parties the Final Judgment shall be the amounts set forth in the schedule attached as Exhibit "B". Upon execution of this Agreement, Counsel for the Unit Owners shall submit to the Court the Final Judgment attached hereto as Exhibit "C", which judgment shall be entered upon the representation that is has been agreed to by the parties;

(v) A judgment shall be entered against PCI in the amount of One Million

Eight Hundred Thousand ($1,800,000) Dollars, representing statutory attorneys fees and costs for all Unit Owners set forth in Exhibit "A" with the exception of Sam Bernard. Upon execution of this Agreement, counsel for the Unit Owners shall submit to the Court the Final Judgment attached hereto as Exhibit "C", which judgment shall be entered upon the representation that it has been agreed to by the parties;

(vi) In connection with PCI's agreement that all final judgments entered against it are final, enforceable, and not subject to appeal, rehearing, collateral attack or further review, PCI hereby consents to the entry of an order requiring that all instruments of indebtedness executed by the Unit Owners to which PCI claims an interest, including those

certain adjustable-rate first mortgage notes in the registry of the Trial Court, be forthwith returned to the Unit Owners, which Order shall be entered immediately upon the execution of this Agreement; and

(vii) PCI and the Unit Owners agree that, in the event PCI recovers any sums of money as a result of any claims it has or will assert against any third parties, whether by settlement, judgment or otherwise, net of reasonable attorneys fees and costs, or if PCI obtains any sums of money from any other source of any kind or nature, that said monies, net of reasonable attorneys fees and costs, shall be used first to satisfy the final judgments in favor of the Unit Owners, as reduced by sums received by the Unit Owners from the said third parties, and that the Circuit Court in and for Palm

Beach County, Florida shall enter an order requiring that any funds recovered by PCI, but only to the extent of the aggregate amount of the final judgments, as reduced, be deposited into the registry of the Court and used to satisfy the outstanding final judgments of the Unit Owners.

(b) As to Sax and Horwitz, it is stipulated that:

(i) Sax and Horwitz will not appeal any aspects of the Memorandum Opinion or Final Judgment with respect to Counts I and II of the Revised Second Amended Counterclaim, but that nothing contained herein shall prohibit Sax and Horwitz from continuing the Appeal, except as aforesaid, in order to reverse the Final Judgment or Memorandum Opinion with respect to Counts III, IV and V of the

Revised Second Amended Counterclaim. Upon execution of this Agreement, PCI shall file a dismissal of their appeal to the extent they seek any relief pertaining to Counts I and II and a notice of intent to continue its Appeal only to the extent it seeks relief from Counts III, IV and V of the Revised Second Amended Counterclaim and those aspects of the Final Judgment or Memorandum Opinion which pertain thereto;

(ii) The Unit Owners will satisfy, of record, the Final Judgment entered against Sax and Horwitz either prior to the conclusion of the Appeal, or after resolution of the Appeal, at the request of Sax and Horwitz, upon PCI, Sax and Horwitz's dismissal of the Appeal as set forth above, the return of the Notes, pursuant to Paragraph 2 (a)(vi) and the

entry of the Judgments provided for above; and,

(iii) In the event Sax and Horwitz, in their individual capacities, recover any sums of monies against third parties based upon claims they have or will assert against third parties, net of attorneys fees and costs, that their recovery shall be subordinate to PCI's recovery of the amount required to satisfy the Unit Owners final judgments against PCI, as reduced by the Unit Owners recovery or compromise, as aforesaid, and that an order of the Circuit Court in and for Palm Beach County, Florida shall be entered regarding the foregoing. In other words, any sums recovered by Sax and Horwitz, individually, will be first used to satisfy the Final Judgment against PCI in favor of

the Unit Owners, as reduced by the Unit Owners actual recovery.

(c) The Unit Owners, PCI, Sax and Horwitz agree, for themselves, their assignees, designees, personal representatives and successors:

(i) To dismiss, with prejudice, any action or claim pending in any Court, in any jurisdiction against each other, with prejudice, except for the continuation of the Appeal (except for Counts I and II of the Revised Second Amended Counterclaim, as aforesaid);

(ii) To refrain from bringing any future action in any jurisdiction against each other except as hereinafter set forth, or as may be required to enforce the conditions of this Stipulation;

(iii) To exchange mutual general releases within a reasonable time form

the date hereof, except as otherwise provided herein;

(iv) The Unit Owners shall not be made parties by PCI, Sax and Horwitz to any claims asserted against PCI, Sax and Horwitz, including, but not limited to, any claims asserted by third parties relating in any way whatsoever to the Palm Court Hotel; and

(v) In the event the Unit Owners are made defendants in any suit or proceeding brought by any third party to which PCI, Sax or Horwitz may be liable by way of contribution, indemnification or otherwise, to either the Unit Owners or the complaining party(s), that the Unit Owners shall not be precluded from asserting third-party cross or counterclaims against PCI, Sax or Horwitz, for all out of pocket monetary damages; and,

in that event, that nothing herein shall preclude PCI, Sax and Horwitz from asserting their respective defenses, which defenses shall, in no event, include the assertion of cross or counterclaims against the Unit Owners or in any way seek affirmative monetary relief against them.

3. PCI, Sax and Horwitz further agree that neither they nor any other party with whom they are affiliated, shall appeal or in any way challenge the Judgment in garnishment entered in favor of the Unit Owners in the amount of Five Thousand ($5,000) Dollars and the Unit Owners shall be entitled to retain said sum.

4. Nothing in this Stipulation, whether expressed or implied, is intended or should be construed to confer, to

grant or to release any person other than the parties to this Stipulation.

5. The parties agree that this Stipulation is final and enforceable.

6. The parties have had independent legal counsel, each is fully cognizant of the Stipulation's terms, ramifications and result and each has read it and understands it in its entirety.

7. This Stipulation is subject to specific performance and the Circuit Court in and for Palm Beach County, Florida, shall retain continuing jurisdiction to enter all orders necessary to carry out the intent of the parties hereunder.

8. This Stipulation and its exhibits may be executed and/or initialed in counterparts.

ATTEST:

By: _____
Lanny A. Horwitz,
its Secretary

PALM COURT, INC.

By:_____
Carl A. Sax,
its President

Carl A. Sax

Lanny A. Horwitz

Michael A. Hanzman,
Counsel for all
Unit Owners on
Exhibit "A"

Andrew Hall,
Counsel for
Palm Court, Inc.,
Carl A. Sax and
Lanny A. Horwitz

EXHIBIT D

EXHIBIT D

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT WEST PALM BEACH, FLORIDA

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

v.

VAUGHN DURHAM, et al.,

Appellees.

RESPONSE OF PALM COURT, INC., CARL A. SAX AND LANNY A. HORWITZ IN OPPOSITION TO RENEWED MOTION TO DISMISS APPEAL

Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz, pro se, hereby file this, their Response in Opposition to Appellees' Vaughn Durham, et al's Renewed Motion to Dismiss Appeal, and state:

1. On September 18, 1989, this Court issued an Order denying Appellees'

motion to dismiss this appeal, which Order directed that:

> "appellant shall have a period of seventy-five (75) days within which to obtain a transcript of the trial testimony from the court reporter, said period to commence as soon as the trial judge enters an order disposing of the current garnishment proceedings against the court reporter involved herein."

2. On November 10, 1989, a Final Judgment for Garnishment was entered by the trial court.

3. According to the terms of this Court's Order, therefore, the trial transcript in this Appeal was to be obtained from the Court Reporter by January 24, 1990.

4. On January 8, 1990, Barbara E.

Bolton, Certified Shorthand Reporter, certified, by Certificates, copies of which are attached hereto as Exhibits A and B, that "the foregoing pages, numbered 1 to 1942, inclusive, constitute a true and correct transcription of my shorthand report of the proceedings of said case through February 19, 1988" and "March 9, 1988" (which constitute those portions of the trial transcript, together with other transcripts previously prepared, required under the Statement of Judicial Acts to be Reviewed and Amended Directions to Clerk filed by Appellants in conformity with the November 30, 1989 Stipulation of Settlement among the parties.

5. Accordingly, Appellees' statement regarding the trial transcript is incorrect since the applicable portions

of the transcript pertaining to the remaining counts to be appealed consistent with the terms of the November 30, 1989 Stipulation of Settlement, were certified by Barbara E. Bolton on January 8, 1990.

6. In addition, it should strain the credulity of the Court that (a) Appellees' garnishment tactics, undertaken to block Appellants' Appeal, is now being asserted as Appellants' "recalcitrance and failure to abide by the applicable appellate Rules" and (b) Appellees' "have been denied any recompense whatever for their losses" when, upon information and belief, Sparber, Shevin, Shapo, Heilbronner and Book, P.A. former securities counsel to Appellants, and Cohen, Scherer and Cohn, P.A., former real estate and closing counsel to Appel-

lants, have collectively paid approximately $2,225,000 to Appellees in a pretrial settlement.

WHEREFORE, Appellants' request that this Court deny Appellees' Renewed Motion.

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 24th day of March, 1990 to Sally Doerner, Courthouse Center, 26th Floor, 175 N.W. First Avenue, Miami, FL 33128-1817.

Lanny A. Horwitz
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Carl A. Sax
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EXHIBIT E

EXHIBIT E

IN THE DISTRICT COURT
OF APPEAL OF THE STATE
OF FLORIDA FOURTH
DISTRICT WEST PALM
BEACH, FLORIDA

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

v.

VAUGHN DURHAM, et al.,

Appellees.

MOTION OF APPELLANTS, PALM COURT, INC., CARL A. SAX AND LANNY A. HORWITZ TO ENFORCE RULE 9.200(b)1

Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz, pro se, hereby file this, their Motion to Enforce Rule 9.200(b)1 and state:

1. Appellants have filed their Statement of Judicial Acts to be Reviewed and Amended Directions to Clerk, and trial transcripts therefore, in a timely

manner, in accordance with the terms of the November 30, 1989 Stipulation of Settlement.

2. Appellees have complained, in their Reply to Appellants' Response in Opposition to Appellees' Renewed Motion to Dismiss Appeal that "the balance of this transcript...is clearly required for Appellants to prosecute this plenary appeal...."

3. Rule 9.200(b)1 provides that: (a) "appellant shall designate those portions of the transcript of proceedings not on file deemed necessary for inclusion in the record," (b) "an appellee may designate additional portions of the proceedings, and (c) "the designating party ...must pay...(for)...the completed manuscript...."

Wherefore, Appellants respectfully

request that the Court issue an order directing Appellees to comply with Rule 9.200(b)1.

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 12th day of April, 1990 to Michael A. Hanzman, Courthouse Center, 26th Floor, 175 N.W. First Avenue, Miami, FL 33128-1817.

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EXHIBIT F

EXHIBIT F

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT WEST PALM BEACH, FLORIDA

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

v.

VAUGHN DURHAM, et al.,

Appellees.

RESPONSE OF APPELLANTS, PALM COURT, INC., CARL A. SAX AND LANNY A. HORWITZ TO APPELLEES' MOTIONFOR ENLARGEMENT OF TIME

Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz, pro se, hereby file this, their Response to Appellees' Motion for Enlargement of Time and state:

1. Appellees, Vaughn Durham, et al. have filed their Motion For Enlargement of Time, bearing Certificate of Service dated April 18, 1990, which seeks en-

largement of time to respond to certain motions.

2. Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz, have, on April 19, 1990, filed their Motion to Enforce Fla.R.App.P. 9.300(a) because Appellees' Motion For Enlargement of Time fails to contain the certificate required by Rule 9.300(a) and therefore, is subject to summary denial.

3. On March 8, 1990, the Court granted the Braverman and Bogen Motion to Withdraw as counsel of record for Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz.

4. Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz, from and after the granting of the Braverman and Bogen Motion to Withdraw, have completed the following:

(a) On March 12, 1990, a Notice of Appearance on behalf of Sax and Horwitz, pro se

(b) On March 12, 1990, Statement of Judicial Acts to be Reviewed

(c) On March 12, 1990, Amended Directions to Clerk

(d) On March 12, 1990, Motion for Extension of Time to File Brief, requesting an order extending the time to file the initial brief until April 15, 1990

(e) On March 24, 1990, Response of Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz in Opposition to Renewed Motion to Dismiss Appeal

(f) On April 2, 1990, Horwitz's Motion for Review of Order of Lower Court Denying Motion to Proceed as Indigent

(g) On April 3, 1990, Separate

Response of Lanny A. Horwitz in Opposition to Renewed Motion and Addendum Thereto to Dismiss Appeal

(h) On April 12, 1990, Motion of Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz to Enforce Rule 9.200(b)1

(i) On April 12, 1990, Motion of Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz to Consider Statement of Judicial Acts to be Reviewed as Dismissal of the Appeal as to Counts I and II of the Revised Second Amended Counterclaim

(j) On April 15, 1990, Appellants' Initial Brief and Appendix

(k) On April 15, 1990, Appellants' Request for Oral Argument

(l) On April 19, 1990, Motion of Appellants, Palm Court, Inc., Carl A.

Sax and Lanny A. Horwitz to Enforce Rule 9.300(a)

5. From the time of the granting of the Braverman and Bogen Motion to Withdraw, during the intervening six (6) weeks, Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz have completed the foregoing twelve (12) filings in an effort to permit this Court to expeditiously rule upon the matters brought before it under Appellants' Initial Brief.

6. The case *sub judice* is nearly two (2) years old due to the effective blocking, by Appellees, of the trial transcript preparation through its garnishment of the court reporter and simultaneous prayers for relief of dismissal for failure of Appellants to complete the trial transcript.

Wherefore, Appellants respectfully request that the Court deny Appellees' Motion for Enlargement of Time and require all parties to adhere to the briefest possible time periods to conclude this appeal.

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 20th day of April, 1990 to Michael A. Hanzman, Courthouse Center, 26th Floor, 175 N.W. First Avenue, Miami, FL 33128-1817.

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EXHIBIT G

EXHIBIT G

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT WEST PALM BEACH, FLORIDA

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

v.

VAUGHN DURHAM, et al.,

Appellees.

REPLY TO APPELLEES' MOTION TO STRIKE APPELLANTS' BRIEF, REPLY TO FURTHER AMENDMENT TO APPELLEES' RENEWED MOTION TO DISMISS APPEAL AND MOTION TO ENFORCE RULE 9.210(f)

Appellants, Palm Court, Inc., Carl A. Sax and Lanny A. Horwitz, pro se, hereby file this, their Reply to Appellees' Motion to Strike Appellants' Brief, Reply to Further Amendment to Appellees' Renewed Motion to Dismiss Appeal and Motion to Enforce Rule 9.210(f) and state as

follows:

1. Contrary to Appellees' Motion, and notwithstanding the September 18, 1989 Order of this Court, the trial judge's November 10, 1989 Final Judgment for Garnishment did not "dispose" of the garnishment proceedings in the sense of "getting rid of" the garnishment but rather "attended to or settled" the findings of fact and conclusions of the trial judge with respect to the Appellees' garnishments of the court reporter and Appellant's counsel.

2. The trial judge decided that the garnishment of the court reporter was proper and that he would "*be compelled to rule in the same way*" (October 24, 1989 Hearing, Page 161) in the future in the event of any further attempts by Appellants to pay for the transcript of re-

cord, even though:

> "The last thing I want to mention, this Court is especially sensitive to the fact that there is an ongoing appeal and that inevitable as a result of the Court's decision, it is obviously going to impact on that appeal. The judgment creditors, the people who won in the trial court, are effectively going over to the Defendant and are taking a sum of money that is critical to the Defendant's right to perfect its appeal and I'm bothered by that. But I have done some independent research and I can find no exception in the Statute that somehow safeguards a civil litigants cache of money, if you will, on the side so that they can prosecute their appeal. It seems to me that you can draw some type of analogy to where the party

> doesn't have money and doesn't post a supersedeas bond, so the party who won in the trial court has the right to go forward and levy and inflict tremendous harm on the other side, despite the fact there is an appeal pending." (October 24, 1989 Hearing, Pages 159-60)

and, a copy of the November 10, 1989 Final Judgment for Garnishment and a copy of the transcript of the Hearing held on October 24, 1989, wherein the findings of fact and conclusions of law of the trial judge are set forth, are attached in the Appendix to this Reply and Motion and are made a part hereof by reference.

3. Accordingly, and as a direct result of the trial judge's November 10, 1989 Final Judgment for Garnishment, which blocked Appellants' Appeal by

preventing transcription of the trial record, Appellants, on November 30, 1989, only 20 days later, entered into a Stipulation of Settlement, with Appellees, limiting the appeal.

4. Thereafter, in compliance with the Stipulation of Settlement, Appellants filed (a) Amended Directions to Clerk, and (b) Statement of Judicial Acts to be Reviewed.

5. Now, after (a) causing Appellants to enter into the Stipulation of Settlement, as a direct result of the November 10, 1989 Final Judgment for Garnishment, (b) Appellants' compliance with the Stipulation of Settlement by limiting the scope of the Appeal, (c) Appellees' receipt of the $11, 120,000 of notes from the registry of the court and entry of a judgment for $1.8 million in

fees and costs, consistent with the Stipulation of Settlement, and (d) Appellants' timely filing of the Initial Brief, Appellees have the audacity to (i) refuse to release the judgments against Carl A. Sax and Lanny A. Horwitz, consistent with the Stipulation of Settlement, and (ii) request that this Court dismiss Appellants' appeal.

6. This request should strain the credulity of the Court and the Court should indulge no more of Appellees' delay tactics and order that Appellees comply with Fla.R.App.P 9.210(f) within ten (10) days or face being held in contempt under Fla.R.App.P 9.410.

Wherefore, Appellants respectfully request that the Court issue an order directing Appellees to comply with Fla.R.App.P. 9.210(f).

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 7th day of May, 1990 to Michael A. Hanzman, Courthouse Center, 26th Floor, 175 N.W. First Avenue, Miami, FL 33128-1817.

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IN THE DISTRICT COURT
OF APPEAL OF THE STATE
OF FLORIDA FOURTH
DISTRICT WEST PALM
BEACH, FLORIDA

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

v.

VAUGHN DURHAM, et al.,

Appellees.

APPENDIX TO REPLY TO APPELLEES' MOTION TO STRIKE APPELLANTS' BRIEF, REPLY TO FURTHER AMENDMENT TO APPELLEES' RENEWED MOTION TO DISMISS APPEAL AND MOTION TO ENFORCE RULE 9.210(f)

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IN THE CORCUIT COURT OF
THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. 86-3885 (CL) F

PALM COURT, INC..,
et al.,

Plaintiffs/Counter-
Defendants,

vs.

FINAL JUDGMENT
FOR GARNISHMENT

VAUGHN DURHAM, et al.,

Defendants/Counter-
Claimants,

and

MUDRICK, WITT & LEVY,

Garnishee.
_____/

THIS CAUSE came before the court for trial without a jury upon the Defendants/Counterclaimants' Motion for Garnishment After Judgment and the Third Party Claim of the law firm of Braverman

and Bogen, and the court having heard and considered evidence and testimony and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is hereby granted and entered in favor of the Defendants/Counterclaimants who shall recover from the Garnishee, MUDRICK, WITT & LEVY, the sum of $5,000, for which let execution issue.

2. The Third Party Claim of the law firm of Braverman and Bogen is determined to be without merit and is hereby denied.

3. The findings of fact and conclusions of law announced by the court at the final hearing on October 24, 1989 are incorporated and adopted here by reference in their entirety.

4. Jurisdiction is hereby reserved for the taxation of costs in accordance

with the applicable statutory provisions.

DONE and ORDERED in chambers at Palm Beach County, Florida on this ___ day of _____, 1989.

SIGNED AND DATED
NOVEMBER 19, 1989
JUDGE DANIEL T. K.
HURLEY
CIRCUIT COURT JUDGE

Copies furnished to:

Robert Bogen, Esquire
Michael Hanzman, Esquire
Thomas Bratton, Esquire

EXHIBIT H

EXHIBIT H

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

PALM COURT, INC., et al.,

Appellant(s),

v. CASE NO. 88-1203

VAUGHN DURHAM, et al.,

Appellee(s).

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

September 5, 1990

BY ORDER OF THE COURT:

ORDERED that the Appellants' June 15, 1990 motion for rehearing and motion for rehearing en banc are denied.

ORDERED that Appellants' July 16, 1990 motion to sever consolidated appeal is denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH,
CLERK.
cc: Larry A. Horwitz
Carl A. Sax
Michael A. Hanzman
cms

EXHIBIT I

EXHIBIT I

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT WEST PALM BEACH, FLORIDA

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

v.

VAUGHN DURHAM, et al.,

Appellees.

MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC

Appellants, Palm Court, Inc. ("PCI"), Carl A. Sax ("Sax"), and Lanny A. Horwitz ("Horwitz"), pro se, respectfully move the Court for rehearing pursuant to Fla.R.App.P. 9.330, and for rehearing en banc pursuant to Fla.R.App.P. 9.331, and show the Court as follows:

I

MOTION FOR REHEARING

On June 4, 1990, the Court granted Appellees, Vaughn Durham, et al's ("Vaughn Durham") March 15, 1990 Renewed Motion to Dismiss Appeal, and dismissed the above-styled Appeal, apparently based upon Appellees, Vaughn Durham's assertion that "this appeal (should) be dismissed as a sanction for the appellants' repeated failures to provide a transcript of the trial."

On March 24, 1990, Appellants, PCI, Sax and Horwitz, in response to Appellees' March 15, 1990 Renewed Motion to Dismiss Appeal filed their Response, which provided, in pertinent part, that:

> "... Appellees' statement regarding the trial transcript is incorrect since the applicable portions of the transcript pertaining to the remaining counts to be appealed con-

sistent with the terms of the November 30, 1989 Stipulation of Settlement, were certified by Barbara E. Bolton on January 8, 1990 .... In addition it should strain the credulity of the Court that (a) Appellees' garnishment tactics undertaken to block Appellants' Appeal, is now being asserted as Appellants' 'recalcitrance and failure to abide by the applicable Appellate Rules' and (b) Appellees' 'have been denied any recompense whatever for their losses' when, upon information and belief, Sparber, Shevin, Shapo, Heilbronner and Book, P.A. former securities counsel to Appellants, and Cohen, Scherer and Cohn, P.A., former real estate and closing counsel to Appellants, have collectively paid approximately $2,225,000 to Appellees in a pretrial settlement."

On April 12, 1990, in response to Appellees' April 3, 1990 Reply, Appellants, PCI, Sax and Horwitz, filed their Motion to Enforce Rule 9.200(b)1, which provided, in pertinent part, that:

> "Appellants have filed their...trial transcripts...in a timely manner, in accordance with the terms of the November 30, 1989 Stipulation of Settlement .... Appellees have complained...that 'the balance of this transcript ... is clearly required for Appellants to prosecute this plenary appeal .... Rule 9.200(b)1 provides that (a) 'appellant shall designate those portions of the transcript of proceedings not on file deemed necessary for inclusion in the record,' (b) 'an appellee may designate additional portions of the proceedings,' and (c)

> 'the designating party ... must pay... (for) ...the completed transcript'...."

On April 20, 1990, in response to Appellees' April 18, 1990 Motion for Enlargement of Time, Appellants, PCI, Sax and Horwitz, filed their Response, which provided, in pertinent part, that:

> "On March 8, 1990, the Court granted the Braverman and Bogen Motion to Withdraw as Counsel of Record ....From the time of the granting of the Braverman and Bogen Motion to Withdraw, during the intervening six (6) weeks, Appellants, PCI, Sax and Horwitz, have completed... twelve (12) filings in an effort to permit this Court to expeditiously rule on the matters brought before it under Appellants' Initial Brief ... (which was filed on April 15, 1990) .... the case *sub judice* is nearly two (2)

> years old due to the effective blocking by Appellees, of the trial transcript preparation through its garnishment of the court reporter and simultaneous prayers for relief of dismissal for failure of Appellants to complete the trial transcript."

On May 7, 1990, in response to Appellees' September 14, 1989 (*sic*) Motion to Strike Appellants' Brief, and Further Amendment to Appellees' Renewed Motion to Dismiss Appeal, Appellants, PCI, Sax and Horwitz, filed their Reply and Motion to Enforce Rule 9.210(f), which provided, in pertinent part, that:

> "Contrary to Appellees' Motion, and notwithstanding the September 18, 1989 Order of this Court, the trial judge's November 10, 1989 Final Judgment for Garnishment did not 'dispose' of the

garnishment proceedings in the sense of 'getting rid of' the garnishment but rather 'attended to or settled' the findings of fact and conclusions of the trial judge with respect to the Appellees' garnishments of the court reporter and Appellants' counsel....The trial judge decided that the garnishment of the court reporter was proper and that he would 'be compelled to rule in the same way' in the future in the event of any further attempts by Appellants to pay for the transcript of record, even though: 'The last thing I want to mention, this Court is especially sensitive to the fact that there is an ongoing appeal and that inevitable as a result of the Court's decision, it is obviously going to impact on that appeal. The judgment creditors, the people

who won in the trial court, are effectively going over to the Defendant and are taking a sum of money that is critical to the Defendant's right to perfect its appeal and I'm bothered by that. But I have done some independent research and I can find no exception in the Statute that somehow safeguards a civil litigants cache of money, if you will, on the side so that they can prosecute their appeal. It seems to me that you can draw some type of analogy to where the party doesn't have money and doesn't post a supersedeas bond, so the party who won in the trial court has the right to go forward and levy and inflict tremendous harm on the other side, despite the fact there is an appeal pending' .... Accordingly, and as a direct result of the trial judge's November 10, 1989 Final

Judgment for Garnishment, which blocked Appellants' Appeal by preventing transcription of the trial record, Appellants, on November 30, 1989, only 20 days later, entered into a Stipulation of Settlement, with Appellees, limiting the appeal .... Now, after (a) causing Appellants to enter into the Stipulation of Settlement..., (b) Appellants' compliance with the Stipulation of Settlement by limiting the scope of the Appeal, (c) Appellees' receipt of the $11,120,000 of notes from the registry of the court and entry of a judgment for $1.8 million in fees and costs, consistent with the Stipulation of Settlement, and (d) Appellants' timely filing of the Initial Brief, Appellees have the audacity to (i) refuse to release the judgments against Carl A. Sax and Lanny A. Horwitz, consist-

> ent with the Stipulation of Settlement, and (ii) request that this Court dismiss Appellants' appeal ...."

The Court has overlooked the controlling law in granting Appellees' Renewed Motion to Dismiss, and dismissing the above referenced Appeal.

The Constitution of Florida creates the right to appeal; and:

> "While the Constitution provides that 'The Supreme Court shall have appellate jurisdiction at all cases at law and in equity originating in circuit courts,' the statutes regulate the appellate processes and procedure and the stages in a cause at which and the time within which the appropriate appellate process and procedure may be utilized; but such statutory regulations and the

> appellate procedure had under the regulations cannot be legally used to impair the right to invoke the appellate jurisdiction conferred upon the Supreme Court by the Constitution or to obstruct the powers of the court to make its appellate jurisdiction effective." Willey v. W.J. Hodgson Corporation, 89 Fla. 446, 105 So. 126 (1925).

In Caudle v. State of Florida, 478 So.2d 359 (Fla. 1st DCA 1985), where appellee moved to dismiss the appeal on grounds that appellant failed to timely file an initial brief and appellant had not requested an extension of time, the court denied the motion to dismiss, and ordered that the case go forward to be decided on its merits, holding that:

> "We have been reluctant to dismiss cases for failure to timely

serve a brief or for failing to timely request an extension of time as to do so would be to penalize the litigant for the shortcomings of counsel. See Winstead v. Adams, 363 So.2d. 807 (Fla. 1st DCA 1978). While we do not foreclose dismissal as a sanction for breaches of the Florida Rules of Appellate Procedure, we do reaffirm our position that it is a sanction which should be employed sparingly and only in those cases where the violations are repeated or serious. It should be noted, however, that dismissal is not the only sanction available under Rule 9.410, Florida Rules of Appellate Procedure, for breaches of appellate procedure. Other options available to the court include reprimand, striking of briefs or pleadings, costs, attorney fees, or contempt. The rule

> also provides for other sanctions fashioned by the court."

In McClain v. Florida Parole and Probation Commission, 416 So.2d. 1209 (Fla. 1st DCA 1982), where appellee's motion to dismiss was denied, the court held:

> "Motions to dismiss should be used primarily for procedural and jurisdictional issues. Whenever possible, courts should decide cases on their merits, rather than on procedural grounds. see Sebree v. Salcedo, 390 So.2d. 801 (Fla. 3rd. DCA 1980); Jockey Club, Inc. v. Blake, 297 So.2d. 44 (Fla. 3rd DCA 1974)."

In Swicegood v. Florida Department of Transportation, 394 So.2d. 1111 (Fla. 1st DCA 1981), where appellee urged that "(a)ppellant's failure to offer any

explanation for its failure to timely prosecute this appeal or seek an extension of time warrants dismissal, the court dismissed the appeal holding that:

> "Although we have been reluctant to dismiss an appeal for failure to comply with the appellate rules, where there has been a flagrant disregard of the rules and appellant has been afforded an opportunity to explain the reasons for noncompliance but does not do so, dismissal is justified. Winstead v. Adams, 363 So.2d. 807 (Fla. 1st DCA 1978); Aiken v. Harvey, 283 So.2d. 872 (Fla. 1st DCA 1973)."

In Sebree v. Salcedo, supra, where appellant's pro se appeal was dismissed only two days after appellee's motion was filed, the court vacated the dismissal order, and held:

"Dismissal for failure to comply with appellate rules is admittedly a sanction available to the court. See Winstead v. Adams, 363 So.2d. 807 (Fla. 1st DCA 1978). The severity of the sanction employed should, however be commensurate with the violation. Turner v. Anderson, 376 So.2d. 899 (Fla. 3d DCA 1979).

Florida Rule of Appellate Procedure 9.04(d) provides: 'At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.' It is apparent that the intent of the rule is that appeals be

decided on their merits. Cf. Gregory v. Gregory, 289 So.2d. 468 (Fla. 2d DCA 1974) (Holding that in order for the case to be decided on other than procedural grounds, the court would sua sponte order the appendix supplemented). A fortiori, when a party is proceeding without the aid of counsel, procedural niceties are to be relaxed. Cf. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972) (Holding that in determining whether to dismiss a pro se complaint, the court should apply a less stringent standard then that applied to pleadings filed by lawyers). The extreme sanction of dismissing a pro se appeal for failure of the brief to comply with technical requirements should be reserved for cases of flagrant noncompliance. See Santuoso v. McGrath & Associ-

> ates, Inc., 385 So.2d. 112 (Fla. 3d DCA 1980); Travelers Insurance Company v. Rodriguez, 357 So.2d. 464 (Fla. 2d DCA 1978); Goldstein v. Goldstein, 284 So.2d. 225 (Fla. 3d DCA 1973)."

Accordingly, it is clear that:

(a) (i) the Constitution of Florida creates the right to appeal, (ii) the Supreme Court has appellate jurisdiction, and (iii) appellate procedure cannot legally be used to impair the right to appellate jurisdiction or to obstruct the power of the Supreme Court to make its appellate jurisdiction effective;

(b) (i) a dismissal is not the only sanction available under Rule 9.410, (ii) motions to dismiss should be used primarily for procedural and jurisdictional issues, (iii) whenever possible courts should decide cases on their merits,

rather than on procedural grounds, (iv) where there has been a flagrant disregard of the rules and appellant has been afforded an opportunity to explain the reasons for noncompliance but does not do so, dismissal is justified, although (v) a court may disregard any procedural error or amend any part of a proceeding in order to permit an appeal to be disposed of on the merits, and (vi) a dismissal is a sanction which should be employed sparingly and only in those cases where the violations are repeated or serious; and

(c) (i) the appellate courts have been reluctant to penalize a litigant for the shortcomings of counsel, (ii) when a party is proceeding without the aid of counsel, procedural niceties are to be relaxed, and (iii) in determining whether

to dismiss a pro se complaint, the court should apply a less stringent standard than that applied to pleadings filed by lawyers.

Therefore, Appellants, PCI, Sax and Horwitz:

(a) will be denied their constitutional right to appeal the issue of their right to trial by jury, if an alleged procedural defect, namely, the filing of a transcript, where preparation was blocked by a garnishment order, is used to avoid the determination of this appeal on its merits;

(b) will be sanctioned where there has been an explanation for noncompliance, if any, and there has not been a flagrant, or for that matter, <u>any</u>, disregard of the Rules, sufficient to dismiss the appeal and avoid determination of the

appeal on its merits; and

(c) will be penalized (i) for the shortcomings of its prior counsel in failing to limit the designation of the record to coincide with the scope of the appeal, (ii) for the permitted withdrawal, over objection of its prior counsel, only seven days before the filing of the Renewed Motion to Dismiss on which the dismissal is based, and (iii) for proceeding without counsel, on a pro se basis, even though Sax and Horwitz are non-practicing members of the Florida Bar.

For each of these reasons, Appellants, PCI, Sax and Horwitz, contend that the Court erroneously dismissed the within Appeal, and request that this Court reinstate the Appeal and determine the issues raised on the Appeal on their

merits.

II

MOTION FOR REHEARING EN BANC

In support of this Motion for Rehearing En Banc, Appellants, PCI, Sax and Horwitz, contend that the decision of the Fourth District in granting Appellees, Vaughn Durham's Renewed Motion to Dismiss based upon their assertion that "this appeal (should) be dismissed as a sanction for the appellants' repeated failures to provide a transcript of the trial" is (a) contrary to decisions in other judicial districts, as well as representing a departure from the Fourth District's own decisions, and (b) of exceptional importance.

Fla.R.App.P. 9.200(f)(2) provides, in pertinent part, that:

"If there is an error

> or omission in the record...the court may correct the record .... If the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record. No proceeding shall be determined because the record is incomplete until an opportunity to supplement the record has been given."

The Notes to Fla.R.App.P. 9.200(f)(2) provide, in pertinent part that:

> "The new rule is intended to insure that appellate proceedings will be decided upon their merits....This rule is intended to assure that any portion of the record before the lower tribunal which is material to a decision by the court will be available to the court. It is specifically intended to avoid those situations which have occurred in the past where an order has

been affirmed because appellant's counsel failed to bring up the portion of the record necessary to determine whether or not there was an error. See Pan American Metal Products Co., v. Healy, 138 So.2d. 96 (Fla. 3d DCA 1962). The rule is not intended to cure inadequacies in the record which result from the failure of a party to properly make a record during the proceedings in the lower tribunal. The purpose of rule is to give the parties an opportunity to have the appellate proceedings decided on the record before the lower tribunal. This rule does not impose on the lower tribunal or the court a duty to review on their own the adequacy of the preparation of the record. A failure to supplement the record after notice by the court may be held against the party at fault."

In Sparta State Bank v. Pape, 477 So.2d. 3, 10 Fla. Law W. 2111 (Fla. 5th DCA 1985), the court held that:

> "Florida Rule of Appellate Procedure 9.200(f)(2) provides that a party must be given an opportunity to supply any omitted parts of the record before a proceeding may be determined adversely to him or her because the record is incomplete."

In Key Capital Corporation v. Keen, 535 So.2d. 345 (Fla. 1st DCA 1988), the court in reversing and remanding for further proceedings, held that:

> "Fla.R.App.P. 9.200(e) places upon the appellant the burden of furnishing an adequate record for appellate review; and, generally, when the record is incomplete or inadequate for the reviewing court to ascertain

> whether the lower court erred, the reviewing court should either dismiss the appeal or summarily affirm the order appealed from. See Applegate v. Barnett Bank of Tallahassee, 377 So.2d. 1150 (Fla. 1979) (cause remanded for entry of an order affirming the final judgment of the trial court), Carter v. Carter, 504 So.2d. 418 (Fla. 5th DCA 1987) (appeal dismissed), Bei v. Harper, 475 So.2d. 912 (Fla. 2d DCA 1985) (order affirmed), Starks v. Starks, 423 So.2d. 452 (Fla. 1st DCA 1982) (order affirmed)."

In Applegate v. Barnett Bank of Tallahassee, 377 So.2d. 1150 (Fla. 1979), in the context of a non-jury trial without a court reporter, the Supreme Court held that:

> "In appellate pro-

ceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. The Applegates correctly point to the lack of a trial transcript or a proper substitute as fatally flawing the appellate court's ruling. The written final judgment by the trial court can well be wrong in its reasoning but the decision of the trial court is primarily what matters, not the reasoning used.

Even when based on erroneous reasoning, a conclusion or decision of the trial court will generally be affirmed if the evidence or an alternative theory supports it. E.g., 3 Fla. Jur. 2d @ 296; In Re: Yohns Estate, 238 So.2d. 90 (Fla. 1970); Goodman v. Goodman, 204 So.2d. 21 (4th DCA Fla. 1967); Escarra v. Winn Dixie Stores,

Inc., 131 So.2d. 483 (Fla. 1961). However, a misconception by the trial judge of a controlling principle of law can constitute grounds for reversal. E.g., Aronson v. Siquier, 318 So.2d. 452 (3d DCA Fla. 1975); Green v. Putnam, 93 So.2d. 378 (Fla. 1957); Knight v. City of Miami, 127 Fla. 585, 173 So. 801 1937....When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial proceedings, the appellate court cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court conclude that the trial judge so misconceived the

> law as to require reversal....E.g., South Florida Apartment Association, Inc. v. Dansyear, 347 So.2d. 710 (3rd DCA Fla. 1977); Strickland v. Lewis, 328 So.2d. 244 (1st DCA Fla. 1976); Troutman v. Conture, 98 Fla. 889, 124 So. 443 (1929)"

In Baron Transport and Claims Center v. Riley, 510 So.2d. 1150 (Fla. 1st DCA 1987), where appellee moved for an order either dismissing the appeal for appellants' failure to provide the court with a record that included a transcript of a certain hearing, or, alternatively, to order appellants to supplement the record, and where appellants contended that because of the narrow issue raised in the appeal, the record as designated was sufficient, the court denied the motion to dismiss or to compel supplemen-

tation, and held that:

> "We recognize that Rule 4.180(d) (which is similar to Rule 9.200(f)(2), Florida Rules of Appellate Procedure), authorizes the court to order supplementation of the record on its own motion or the motion of a party if the record is incomplete. While the ultimate concern of the court is that cases be decided on the merits, it is not our purpose to '[lead] the parties by the hand in an attempt to get an adequate record.' Stack v. Lareau, 433 So.2d. 66, 68 (Fla. 4th DCA 1983) (quoting Kaufmann v. Baker, 392 So.2d. 13, 15 (Fla. 4th DCA 1980)); see also Rule 9.200(f), Florida Rules of Appellate Procedure, committee notes ('A failure to supplement the record after notice by the court may be held against the party at fault.') We find

> that because appellants continue to assert that the record is complete for appellate review (and, as the initial brief has not yet been filed, we are unable to contradict that assertion), appellee's proper remedy is to argue for affirmance in the answer brief on the basis of Applegate v. Barnett Bank, 377 So.2d. 1150 (Fla. 1979) and Clayton v. Clayton, 442 So.2d 310 (Fla. 1st DCA 1983)."

In Carter v. Carter, 504 So.2d. 418 (Fla. 5th DCA 1987), where appellee moved to dismiss because a transcript of the hearing was not included in the record on appeal, and appellant conceded that a transcript was not included because the proceedings were not recorded, but contended, however, that Rule 9.200(f)(2) prevents dismissal of the appeal until he

has been given an opportunity to supplement the record, the court dismissed the appeal for failure to provide an adequate record to support his appeal, and held that:

> "Where, as here, the correctness of the trial court's ruling depends on the evidence presented to it, a report of that evidence...is absolutely essential to an appellate review .... As we pointed out in Beasley v. Beasley, 463 So.2d 1248 (Fla. 5th DCA 1985): Unless this court is provided with all of the evidence which was before the trial court, either by a transcript of testimony or a stipulated statement, then we cannot fault and reverse a trial judge for a purported error. It is the appellant's burden to submit to the appellate court a record adequate to support

the appeal. Right v. Right, 431 So.2d. 177 (Fla. 5th DCA 1983). Where the nature of the appeal requires that the record include the testimony, where it is not available we will either dismiss the appeal or summarily affirm the order appealed from. Beasley....

As the court pointed out in Thomas v. Thomas, 11 F.L.W. 2597 (Fla. 5th DCA Dec. 11, 1986): The provision in Rule 9.200(f)(2) relied upon by the appellant...does not encompass a situation where there is an absence of the record below, as opposed to a failure by the parties to include parts of an extant record below in the record on appeal. If a record exists below that is needed to complete the appellate record, then this court cannot determine the cause without affording a

> party an opportunity to supply the omitted part of the record. But if no record was created in the first place--either by court reporting or a submitted statement per Rule 9.200(b)(3)--then there is no obligation on this court's part to afford a party on appeal a second opportunity to create a record simply because he ignored the rule the first time around. See Beasley v. Beasley, 463 So.2d. 1248 (Fla. 5th DCA 1985)."

Indeed, the Court's dismissal of the within Appeal is a departure from its prior holdings in Kaufman v. Baker, 392 So.2d. 13 (Fla. 4th DCA 1981) and Stack v. Lareau, 433 So.2d. 66 (Fla. 4th DCA 1983), where the Court held that:

> "For the guidance of the bar, however we deem it advisable to discuss the ramifica-

tion of Florida Rules of Appellate Procedure...9.200(f)(2) regarding supplementation of the record ....

Under Rule 9.200(f)(2), this court is required to allow an opportunity for supplementing an incomplete record before deciding the case based on the insufficiency of the record. By moving to reconstruct the record, appellant here has already had his opportunity....Under these circumstances, where the record deficiencies are apparent and the record itself reflects appellants awareness of them, we find no need to award a second opportunity to supplement the record. To hold otherwise would necessitate our leading the parties by the hand in an attempt to get an adequate record." Kaufman, supra.

"Appellant has failed to furnish a record of the trial court proceedings before the jury, and although we permitted appellant to supplement the record, appellant has failed to furnish a complete transcript of the trial.... We do not find Florida Rule of Appellate Procedure 9.200(f)(2) applicable under the circumstances of this case. Appellee raised the insufficiency of the record in his brief and this Court granted appellant's motion to supplement the record after the briefs were filed. Appellant elected only to furnish us with a transcript of the proceedings which would furnish the basis for his first two points on appeal. We think our comments in Kaufman v. Baker 392 So.2d. 13 at 15 (Fla. 4th DCA 1980) applied to the facts of this case.

Under these circum-

> stances, where the record deficiencies are apparent and the record itself reflects appellants awareness of them, we find no need to award a second opportunity to supplement the record. To hold otherwise would necessitate our leading the parties by the hand in an attempt to get an adequate record." Stack, supra.

Accordingly, it is clear that:

(a) (i) Fla.R.App.P. 9.200(f)(2) provides that if the record is incomplete, the court shall direct a party to supply omitted parts of the record and no proceeding shall be determined until that party has been given an opportunity to supplement the record, and (ii) Fla.R.App.P. 9.200(f)(2) is intended to insure that appellate proceedings will be decided upon their merits and does not

impose a duty on the court to review, on their own, the adequacy of the record;

(b) (i) Generally, when the record is incomplete or inadequate for the reviewing court to ascertain error, the reviewing court should either dismiss the appeal or affirm the lower court's order, and (ii) a misconception by the trial judge of a controlling principle of law can constitute grounds for reversal but, without knowing the factual context an appellate court may not be able to conclude that the trial judge so misconceived the law as to require reversal; and

(c) (i) While the ultimate concern of the court is to decide cases on the merits, it is not the court's purpose to lead parties by the hand to get an adequate record, (ii) although a failure to

supplement the record, after notice by the court, may be held against the party at fault, (iii) but because appellants continue to assert that the record is complete for appellate review (and, as the initial brief has not yet been filed and contradiction is impossible), appellee's proper remedy is to argue for affirmance in the answer brief, (iv) where the correctness of the trial court's ruling depends on the evidence presented, a report of that evidence is absolutely essential to appellate review, and (v) where the nature of the appeal requires that the record include trial testimony, where it is not available, the court will either dismiss the appeal or affirm the appealed order.

Therefore, the Fourth District, by granting Appellees Vaughn Durham's

Renewed Motion to Dismiss Appeal for an alleged failure to provide a transcript of the trial is contrary to decisions in other districts, as well as representing a departure from the Fourth District's own decisions, since:

(a) (i) The Court has not directed Appellants, PCI, Sax and Horwitz, to supply alleged omitted parts of the record and has determined the proceeding by dismissal before Appellants, PCI, Sax and Horwitz, have been given an opportunity to supplement the record, if required, and (ii) the Court has taken it upon itself to determine that a complete record is required, without reviewing Appellants, PCI, Sax and Horwitz's Initial Brief, in order to determine the proceedings on a procedural basis instead of on the merits;

(b) (i) The Court, without reviewing Appellants, PCI, Sax and Horwitz's Initial Brief is unable to determine whether the record is incomplete or inadequate and (ii) the Court, as a result thereof is also unable to determine whether the issues raised on appeal, which are not evidentiary,[1] namely whether the trial

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1. In fact, Appellants, PCI, Sax and Horwitz's April 15, 1990, Initial Brief provides, in pertinent part, that:

"The Trial Court's Memorandum Opinion tracks Alna Capital Associates v. Wagner, 758 F.2d. 562 (11th Cir. 1985), where the Eleventh Circuit held that a trial court's findings that a defendant had committed securities fraud would be affirmed where the trial court made careful, detailed findings which were sufficiently supported by the evidence.

Accordingly, even though Plaintiff/-Appellants, PCI, Sax and Horwitz assert that the Trial Court's findings are not sufficiently supported by the evidence, Plaintiff/Appellants, PCI, Sax and Horwitz recognize that an appeal of the Trial Court's findings, in a non-jury setting, are virtually unassailable.

court erred in denying Appellants, PCI, Sax and Horwitz (x) a jury trial as guaranteed by the Florida Constitution and (y) judicial enforcement of a contract require additional portions of the record; and

(c) (i) Appellants, PCI, Sax and Horwitz have and continue to assert that

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...Continued...

Therefore, Plaintiff/Appellants, PCI, Sax and Horwitz have not sought to appeal the Trial Court's findings in the Memorandum Opinion. However, Plaintiff/-Appellants, PCI, Sax and Horwitz's failure to challenge the Trial Court's findings should not be deemed, by this Court as acquiescence or admission to any portion of the Memorandum Opinion."

Indeed, Appellants, PCI, Sax and Horwitz would have been hard pressed to challenge the findings of the Trial Judge, a former member of the Fourth District, after the Fourth District's dicta in its opinion filed January 24, 1990 in a related appeal, in Case No. 88-3012, wherein the Fourth District described the Trial Court's Memorandum Opinion as "compelling and exhaustive."

Horwitz have and continue to assert that the record is complete for appellate review, (ii) the Court has not reviewed the Initial Brief to determine otherwise, (iii) Appellants, PCI, Sax and Horwitz have not failed to supplement the record, after notice, and (iv) the within Appeal has not either been determined on the merits or dismissed for valid procedural grounds.

For each of these reasons, Appellants, PCI, Sax and Horwitz submit that the matter should be considered by the Court en banc.

In addition to the foregoing, consideration by the full court is necessary in order to safeguard basic constitutional rights which might otherwise be abrogated through procedural grounds.

The record before the Fourth District

includes Appellants, PCI, Sax and Horwitz's Motion to Require Counsel to Abate Garnishments, filed by Appellants, PCI, Sax and Horwitz's former counsel, which provided, in pertinent part that:

> "Recognizing the intimidating and chilling effect that their actions have had on the court reporter's timely preparation of the appeal transcripts, Appellees have sought to capitalize further by refusing to bring this matter to a judicial resolution, and by blaming Appellants for failure to obtain timely preparation of the appeal transcripts....
>
> Undersigned counsel has now learned from Appellees' counsel that <u>another</u> Writ of Garnishment has been served upon the court reporter. This is despite the established facts, which are within the knowledge of Appellees'

counsel, that the court reporter has no fee or cost arrangement with Appellants but, rather, the court reporter has a fee and cost arrangement solely with undersigned counsel. Moreover, Appellees' counsel is well aware that the court reporter has been intimidated by the Writs of Garnishment form working on the appeal transcripts, regardless of who its contractual relationship is with, until the matter becomes judicially settled.

It is an utter abuse of process for Appellees to file garnishment actions against the court reporter knowing that the court reporter has a contractual relationship and is receiving monies solely from undersigned counsel, and further knowing that the court reporter has been intimidated from working on the appeal transcripts by virtue

of the Writs of Garnishment, and thereafter objecting to Appellants' Motion for Extension of Time Re: Appeal Transcripts and moving to dismiss the Appeal on the basis of untimely preparation of the transcripts! It is to be noted that at no time have Appellees ever challenged or replied to the court reporter's position that its contractual relationship is <u>with undersigned counsel</u> and that any monies that it is holding are for the account <u>of undersigned counsel</u>.

It is apparent from the above facts that undersigned's counsel's inability to accomplish that which this Court has previously ordered (preparation of the appeal transcripts within a certain specified period of time) has been occasioned directly by Appellees' blatant and

> improper interference with the court reporter's progress, by filing multiple Writs of Garnishment against the court reporter with full knowledge that the court reporter's contractual and financial relationship is solely with undersigned counsel (who is the sole party that has made payments to the court reporter for transcription costs, pursuant to said contractual and financial relationship)."

Accordingly, to permit the Fourth District to grant Appellees, Vaughn Durham's Renewed Motion to Dismiss as a sanction for an alleged failure to provide a trial transcript, especially where (a) Appellants, PCI, Sax and Horwitz contend that the applicable portions of the trial record have, in fact, been prepared, consistent with the November 30,

1989 Stipulation of Settlement with Appellees, Vaughn Durham, (b) the Fourth District has not reviewed the Initial Brief, (c) the Fourth District has not given Appellants, PCI, Sax and Horwitz an opportunity to supplement the record, and (d) the Fourth District has not sought, as required, to discharge its ministerial duty to decide the within Appeal on its merits, would be to deny Appellants, PCI, Sax and Horwitz the right to appellate review both to Appellants, PCI, Sax and Horwitz and to any other unsuccessful litigant who was financially unable to post a supersedeas bond.

Therefore, the decision of the Fourth District, dismissing the Appeal, is of major importance requiring this Court, sitting en banc, to safeguard the basic constitutional right to appellate review

for all citizens of the State of Florida.

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Attorneys for Plaintiff/-
Appellants, Palm Court,
Inc., Carl A. Sax and
Lanny A. Horwitz

STATEMENT OF COUNSEL

We express a belief, based on reasoned and studied professional judgment, that the decision of the Court granting Appellees, Vaughn Durham's March 15, 1990 Renewed Motion to Dismiss Appeal, and dismissing the above-styled Appeal, is (a) contrary to decisions in other judicial districts as well as a departure from the Fourth District's prior decisions, and (b) of exceptional importance,

and that consideration by the full Court is appropriate and required in order to (x) maintain uniformity of decisions among the districts, and to (y) safeguard basic constitutional rights which might be otherwise abrogated through procedural grounds .

Lanny A. Horwitz, Esq.

Carl A. Sax, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 14th day of June, 1990 to Michael A. Hanzman, Floyd, Pearson, Richman, Greer, Weil, Zack and Brumbaugh, P.A. CourtHouse Center, 26th Floor, 175 N.W. First Avenue, Miami, FL 33128.

Lanny A. Horwitz, Esq.

EXHIBIT J

EXHIBIT J

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

CASE NO. 88-1203

PALM COURT, INC., et al.,

Appellants,

vs.

VAUGHN DURHAM, et al.,

Appellees.
_____/

APPELLEES' RESPONSE TO APPELLANTS' MOTION FOR REHEARING AND FOR REHEARING EN BANC

Appellees Vaughn Durham, et al, through counsel, pray that Appellants' Motion for Rehearing and for Rehearing En Banc be denied and as reasons therefor, allege:

In addition to their prior transgressions of the Florida Appellate Rules, Appellants now flagrantly violate Florida Appellate Rule 9.330(a) by

rearguing the merits of this Court's order of June 4, 1990 dismissing this appeal.

The Most cursory examination of Appellants' Rehearing Motions reveal that they merely reargue, in haec verba, the identical matters previously argued and considered by this Court before the order dismissing this appeal was entered.

For the convenience of the Court,[1] Appellees review the manner (highly prejudicial to Appellees) in which Appellants have violated the appellate rules in conducting this appeal. To review the record:

1. This Plenary appeal from the trial court's memorandum opinion and

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1. However, without cluttering the record with duplicative exhibits attached to our last motion.

final judgment was filed on May 2, 1988, two years and two months ago.

2. On August 1, 1988, Appellees filed a motion to enforce the provisions of Florida Rules of Appellate Procedure 9.200 (e), requesting that the Court order that Appellants designate the transcript of trial for purposes of this appeal. Thereafter, on August 30, 1988, this Court entered an Order to Show Cause as to why this appeal should not be dismissed.

3. Subsequently the Appellants filed a "Designation to Court Reporter and Reporter's acknowledgment", together with "Directions to the Clerk". In their Designation to Reporter and Reporter's acknowledgment, the appellants designated for transcription and filing:

> The entire trial proceedings recorded

> by the reporter beginning February 16, 1988, and ending March 21, 1988 before the Honorable Daniel T.K. Hurley".

Furthermore, in their Directions to the Clerk, the Appellants designated numerous pleadings and exhibits in the record to be prepared as part of the record on appeal in this cause.

4. On October 17, 1988 this Court entered an Order which stated as follows:

> Ordered that Appellants' October 6, 1988 Designation to Reporter and Court Reporters Acknowledgment is noted. The court reporter is hereby granted an extension of time of ninety (90) days ONLY from the date of this Order to prepare the transcript of the proceedings for this appeal.

5. On June 8, 1989 the Appellees filed a Motion to Dismiss this Appeal,

noting that the Appellants had failed to comply with this Court's Order dated October 17, 1988, requiring that the transcript in this cause prepared and filed within ninety (90) days.[1]

6. On the 9th of June, 1989, Appellants filed another "Motion for Extension of Time re: Transcript Preparation". In that Motion, the Appellants again represented to the Court that the number of transcript pages being transcribed were seventy seven hundred (7,700), and that approximately a hundred eighty days (180) would be needed for preparation of the

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1. This Court gave the Appellants this ninety (90) day extension based upon their representation to the Court that they were preparing the entire transcript in this matter. See Appellants' Response to Order to Show Cause and Response to Motion to Enforce Rule 9.200, filed on September 2, 1988.

transcript. Appellees vigorously opposed that Motion. Then, in response to Appellees' initial Motion to Dismiss Appeal, the Appellants again represented to the court that:

> As stated in Appellants' Motion for Extension of Time re: Transcript Preparation, the Court Reporter has indicated that approximately forty seven hundred pages (4,700) remain to be transcribed from the original seventy seven hundred page (7,700) estimate and approximately seventy five (75) additional days will be necessary in order to accomplish this task. Appellants respectfully request that this Honorable Court consider the circumstances presented above, deny the Motion to Dismiss Appeal, grant the Motion for Extension Time....:

7. On September 12, 1989 this Court heard oral argument on the Appellees Motion to Dismiss this Appeal. Thereafter, on September 18, 1989 the Court entered an Order denying Appellees Motion to Dismiss the Appeal and providing as follows:

> IT IS FURTHER ORDERED that Appellant shall have a period of seventy five (75) days within which to obtain a transcript of the trial testimony from the court reporter, said period of time to commence as soon as the trial judge enters an Order disposing of the current garnishment proceedings against the court reporter involved herein.

8. On November 10, 1989 the trial judge entered an Order disposing of the garnishment proceedings, thereby triggering the seventy five (75) day period

dictated by this Court's September 18th Order. Thus, pursuant to the Court's September 18th Order, the trial transcript was due to be filed no later than January 24, 1990.

9. Two months later, on March 15, 1990, Appellees filed a Renewed Motion to Dismiss Appeal. Appellees pointed out that for the third time the Appellants had totally disregarded this Court's Order by failing to file the trial transcript.

10. Subsequently, Appellants filed a Record on Appeal, indicating that only a very minor portion of the trial transcript had been prepared; specifically less than one0-fourth (1/4) of the overall transcript. Additionally, numerous portions of the file contained in Appellants' initial Directions to the Clerk

were not included in their Record on Appeal.

11. Moreover, together with the filing of this unfairly abbreviated Record on Appeal and their initial brief, Appellants filed a motion requesting that Appellees be required to comply with Rule 9.200 by designating other portions of the trial transcript which we wished to have transcribed and prepared. Thus, after representing to this Court for two years, on no less than four occasions, that they were preparing the trial transcript, thereby getting numerous extensions of time from this Court, Appellants finally indicated that they intended to rely on less than one fourth (1/4) of the overall transcript, and that Appellees should bear the burden of having the balance of the record transcribed and

submitted to this Court. This would, of course, have taken a considerable amount of time, and forced Appellees to go through substantial expense.

12. As indicated previously, this appeal had been pending for in excess of two years, and it is inconceivable how Appellants could have filed a Record on Appeal which contained less than one fourth (1/4) of the overall trial transcript, and simultaneously demand that Appellees, two years later, be required to provide the greater part of the record to the Court. This Court had given Appellants over two years to prepare and file the trial transcript in this case. This Court has entered two orders specifically requiring that a"transcript of the trial testimony" be filed within a set time period, both of which have been

disregarded by the Appellants. See Orders dated October 17, 1988 and September 18, 1989.

13. Now, after having considered Appellants' initial brief and the inadequate record Appellants finally brought before the Court, and after all the generous allowances made to these Appellants, this Court has appropriately dismissed this appeal. The Court should forthwith deny Appellants improper Motions for Rehearing and Rehearing En Banc.

14. Under the peculiar facts and circumstances of this case, and considering the generosity of this Court to Appellants, none of the cases cited by Appellants in their Motions are apposite. Indeed, the language cited by Appellants in said Motions supports Appellees'

position and fully justifies the Court's Order of Dismissal of June 4, 1990.

15. For example, the language quoted by Appellants in their Motions for Rehearing (hereafter MFR), at page 6, from Swicegood v. Florida Department of Transportation, 394 So.2d 1111, 1112 (Fla. 1st DCA 1981), singularly buttresses this Court's order of dismissal. The quotation from Sparta State Bank v. Pope, 477 So.2d 3, 10 Fla.Law W. 2111 (Fla. 5th DCA 1985), cited at MFR p. 11, does not appear anywhere in that case. Without repeating the identical citations from Key Capital Corporation v. Keen, 535 So.2d 345, 346 (Fla. 1st DCA 1988), set forth at MFR p. 11-12, and Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979), at MFR 12-13, and Baron Transport and Claims Center v.

Riley, 510 So.2d 1150, 1151 (Fla. 1st DCA 1987), at MFR 13-14, and Kaufman v. Baker, 392 So.2d 13, 14-15 (Fla. 4th DCA 1981), and Stark v. Lareau, 433 So.2d 66, 67 (Fla. 4th DCA 1983), MFR 15-16, we adopt these authorities as if set forth herein in support of this Court's order of June 4, 1990, and the dismissal of Appellants' Motions for Rehearing.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 3rd day of July, 1990 to Carl A. Sax, 6015 South Ocean Boulevard, Ocean Ridge, Florida 33435 and Lanny A. Horwitz, WatersEdge at Shelter Cove, Suite 201, P.O. Box 5684, Hilton Head Island, S.C. 29938.

Respectfully submitted,
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